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CASES AT LAW

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT DECEMBER TERM, 1847.

CHARLES WASHING *vs.* EDMUND WRIGHT.

The testimony of a partner, not a party to the record, may be introduced by the plaintiff to prove that the defendant was a member of the firm and that goods were delivered to them by the plaintiff.

The case of *Cummins* v. *Coffin*, 7 Ired. 196, cited and approved.

Appeal from the Superior Court of Law of Chowan County, at the Fall Term, 1846, his Honor Judge DICK presiding.

This was an action of assumpsit, in which the only question was, whether one Jones, who was offered as a witness for the plaintiff, was competent. Jones was offered as a witness to prove the sale and delivery of the goods. The defendant objected that he was interested, and introduced one McCoy to prove his interest. McCoy stated the goods were ordered for him and the witness, they having agreed to go into business as copartners; but before their arrival, they dissolved, and the goods were not received *by them*. The witness, Jones, was then

introduced, under the directions of the Judge, whereupon the defendant insisted on examining him, as to his interest, which the Judge permitted, and, on the examination of the witness, he stated the ordering of the goods, as aforesaid, the failure of himself and McCoy to go into business: that thereafter, he and the defendant entered into copartnership, and purchased the goods of the plaintiff, and received them. The witness stated he had paid for half of the goods, and did not consider himself further liable, though he had no discharge. There was no other evidence of the copartnership, nor of the purchase, than that derived from this witness. The defendant moved to exclude the witness for interest. This was refused by the Judge. The witness was introduced in chief, proved the sale and delivery of the goods to the defendant and the witness, and the copartnership of the witness and the defendant: thereupon a verdict was rendered for the plaintiff. A rule for a new trial was had and discharged —and a judgment on the verdict, from which the defendant appealed.

A. Moore, for the plaintiff, cited the cases of *Blackett* v. *Weir*, 11 Eng. C. L. R. 257, and *Cummins* v. *Coffin*, 7 Ired. 196.

No counsel appeared in this Court for the defendant.

Daniel, J. We are of opinion, that the two cases, cited by the plaintiff's counsel, show, that the decision of the Judge was right. *Blackett* v. *Weir* (11 Eng, C. L. 257,) establishes, that, where in assumpsit for goods sold and delivered, to which the general issue was pleaded, a witness, called by the plaintiff to prove the defendant's liability, admitted on the *voir dire*, that he (the witness) was jointly liable as a partner, this did not render him incompetent; for, if the plaintiff recovered, the defendant would have contribution, and, if he failed, he might sue the witness for the whole, and the latter may then

claim contribution from the defendant. BAYLEY, J. said, "the only difficulty arises from his proving a partnership with the defendant;" but his (the witness') testimony would not prove *that*, in any other action. In *Cummins* v. *Coffin*, 7 Ired. 176, it was held, that, in an action against two partners, the plaintiff may introduce the testimony of a third partner, not a party to the record, though he could not be compelled to give his testimony.

PER CURIAM. Judgment affirmed.

SAMUEL W. SMITH *vs* C. W. ANDREWS

When a vendee takes an article *at his own risk*, or *with all faults and defects*, the vendor is not responsible for not disclosing any faults or defects he may know to exist in the thing sold; unless he makes use of some artifice or practice to conceal the faults or defects, or to prevent the purchaser from discovering them.

Appeal from the Superior Court of Law of Bladen County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This was an action on the case for a deceit on the part of the defendant, in trading a note to the plaintiff for a horse. It appeared in evidence, that a conversation took place between the parties about the trade of a note held by the defendant on one ——— and endorsed by one Worthington, for sixty-eight dollars, in which the defendant said the note was perfectly good. This conversa-

introduced, under the directions of the Judge, whereupon the defendant insisted on examining him, as to his interest, which the Judge permitted, and, on the examination of the witness, he stated the ordering of the goods, as aforesaid, the failure of himself and McCoy to go into business: that thereafter, he and the defendant entered into copartnership, and purchased the goods of the plaintiff, and received them. The witness stated he had paid for half of the goods, and did not consider himself further liable, though he had no discharge. There was no other evidence of the copartnership, nor of the purchase, than that derived from this witness. The defendant moved to exclude the witness for interest. This was refused by the Judge. The witness was introduced in chief, proved the sale and delivery of the goods to the defendant and the witness, and the copartnership of the witness and the defendant: thereupon a verdict was rendered for the plaintiff. A rule for a new trial was had and discharged —and a judgment on the verdict, from which the defendant appealed.

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claim contribution from the defendant. BAYLEY, J. said, "the only difficulty arises from his proving a partnership with the defendant;" but his (the witness') testimony would not prove *that*, in any other action. In *Cummins* v. *Coffin*, 7 Ired. 176, it was held, that, in an action against two partners, the plaintiff may introduce the testimony of a third partner, not a party to the record, though he could not be compelled to give his testimony.

PER CURIAM. Judgment affirmed.

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This was an action on the case for a deceit on the part of the defendant, in trading a note to the plaintiff for a horse. It appeared in evidence, that a conversation took place between the parties about the trade of a note held by the defendant on one ——— and endorsed by one Worthington, for sixty-eight dollars, in which the defendant said the note was perfectly good. This conversa-

tion took place at the house of the plaintiff, and, shortly after, the parties went to look at the horse, then at the house of a neighbour. It also appeared for the plaintiff, that, after the trade, and when the defendant had just got the possession of the horse, he remarked "there is a good horse I have got for a note on Jesse ——— and John Worthington," mentioning the amount of the note; upon which, a bystander said to the defendant, "the note is not worth a cent, I would not give a cent for it." The defendant then said, "whether it is worth a cent or not, I have got a good horse for it;" and in another part of the conversation he said "he had got something, when he expected to get very little, and the horse was clear gains to him". It also appeared that the plaintiff lived about twenty miles from said ——— and Worthington, and that they were insolvent at the time of the trade, and had been for some months before.

For the defendant it appeared, that, when the parties went to the house where the horse was, they commenced chaffering about the note for the horse; the defendant said the note was genuine and that he would warrant that it was signed by the parties, and in speaking of the maker and endorser, the defendant said, "you know that Daniel Baldwin says that ——— looks like a man that would pay his debts, and as for Worthington, you know him as well as I do." The plaintiff then asked the defendant to endorse the note, which he refused, saying, that he was a trading man and dealt in notes, but he would not endorse the note of a wealthy man in the neighborhood, naming him; and said to the plaintiff if he took the note, he must take it at his own risk. The plaintiff then took the note, and the horse was shortly thereafter delivered to the defendant.

A witness for the plaintiff proved that the defendant, in his trading, sometimes visited the neighborhood of the parties to the note.

The Court charged, that, to entitle the plaintiff to a verdict, he must satisfy the jury that ——— and Worthington were insolvent at the time of the trade, and that the defendant knew it and concealed it from the plaintiff, and though it might be true, that the plaintiff agreed to take the note at his own risk, yet if he was ignorant of the condition of the parties to the note, and the defendant knew it and concealed it, it would be a fraud on the plaintiff, and he would be entitled to their verdict.

The jury returned a verdict for the plaintiff. A motion for a new trial was made, because of misdirection, which was refused, and the defendant appealed.

No counsel for the plaintiff in this Court.

Strange, with whom were *W. Winslow* and *D. Reid*, for the defendants, argued,

1. That no action for deceit is upon a bare silence with respect to defects. *Hammond's N. P.* 326. 1 *Archbolds' N. P.* 440. 1 *Story's Eq. Jur. Sec.* 212. *Kent's Com. Sec.* 39.

2. That this is especially true in relation to negotiable paper. *Carpenter* v. *Wall*, 4 Dev. & Bat. 144. *Ward* v. *Evans*, 2 Ld. Ray. 928. *Clerk* v. *Mundal*, 12 Mod. 203.

3. That at any rate it does not lie either for concealment or a false affirmation, unless the plaintiff has no convenient means of detecting the falsehood. *Hammond's N. P.* 329. *Verron* v. *Keys*, 12 East. 632. *Bayley* v. *Merrel*, Cro. Ja. 385. *Saunders* v. *Hatterman*, 2 Ire. 32. *Organ* v. *Laidlan*, 2 Wheat. 178, and note c. page 185.

4. But that a sale with all faults is conclusive between the parties, unless some artifice is practised to mislead the plaintiff. *Hammond's N. P.* 330. *Pickering* v. *Dawson*, 4 Taun. 779.

Daniel, J. The first part of his Honor's charge to the jury is unobjectionable, and right in law; but when he proceeded to say, "though it might be true, that the

plaintiff agreed to take the note at his own risk, yet if he was ignorant of the condition of the parties to the note, and the defendant knew it and concealed it, it would be a fraud on the plaintiff, and he would be entitled to their verdict," we think he erred.

In the case of *Mellish* v. *Matteux*, Peaks' N. P. cases 115, Lord KENYON laid down the law as his Honor did in this case; for he said, "with all faults" means with all faults unknown to the vendor; but in *Baslehole* v. *Watters*, 3 Camp. 154, Lord ELLENBOROUGH overruled the case of *Mellish* v. *Matteux*, and his decision is confirmed by the whole Court of Common Pleas, in the case of *Pickering* v. *Dawson*, 4 Taunt. 778. The meaning of selling "with all faults," is, that the purchaser shall make use of his eyes and understanding to discover what defects there are. But the vendor is not to make use of any artifice or practice to conceal faults, or to prevent the purchaser from discovering a fault, which he, the vendor, knew to exist. When the vendee takes the article at his own risk, or with all faults and defects, the vendor is relieved from disclosing any faults he may know to exist in the thing sold; the maxim *caveat emptor*, then applies.

We think that there must be a new trial.

PER CURIAM. New trial awarded.

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THE STATE, UPON THE RELATION OF MARY J. POOL *vs.* JOHN C. EHRINGHAUS.

Where a Clerk and Master has received money in his office under a decree of the Court, and used it, and afterwards pays it out to a person, whom he thought entitled to receive it, but who in fact was not so, he is liable to the party properly entitled, not only for the principal received, but also for interest thereon up to the time of the payment to such party.

Appeal from the Superior Court of Law of Pasquotank County, at the Fall Term, 1847, his Honor Judge DICK presiding.

This was an action of debt on the official bond of the defendant as Clerk and Master of the Court of Equity of Pasquotank County.

The facts were submitted to the Court upon the following *case agreed.*

At the Fall Term, 1835, on the petition of Samuel Lamb, and his wife, and Mary J. Pool, the present plaintiff, who was then a minor, and appeared by her next friend, Jesse L. Pool, an order was made by the Court of Equity for Pasquotank County, for the sale of a tract of land, held by them as tenants in common, and at the Spring Term of the Court succeeding, a report of the sale was filed and confirmed, for the sum of $750. At the Spring Term, 1838, an order was made, directing the Clerk and Master to collect the money, which the defendant did. At the Spring Term, 1839, on a petition filed by Lamb and his wife, an order was made directing the Clerk to pay Mr. Lamb his moiety of the money arising from the sale, and which was then in office. On the 5th of September, 1839, without any order of Court, under the belief that Jesse L. Pool was the guardian of his daughter Mary Jane Pool, the defendant paid over to him, as such guardian, the sum of $434 94, which was the principal and *interest* due to Mary J. Pool, *up to that time.*

The action is in debt on the official bond of the defendant; and the only question presented in the case is whether the plaintiff is entitled to interest on the amount due her, from the time the money was wrongfully paid to J. L Pool.

Upon the case agreed, the Judge below being of opinion that the defendant was liable for the interest claimed by the plaintiff, gave judgment accordingly; and from this judgment the defendant appealed.

A. Moore, for the plaintiff.
No counsel for the defendant.

Nash, J. This is a case agreed, and we are required upon the facts, to draw such a conclusion as a jury would. The case states that the sum of four hundred and thirty-four dollars and ninety-four cents, paid to Jesse L. Pool, consisted of principal and interest, up to the time of the payment by the Clerk. It is not stated what sum the Master did collect, nor when. But it is clear the money was in the office at the Spring Term 1839, or before, and the payment to Pool, was on the 5th of September following, and the interest was calculated up to that time. If so, it must have been upon the ground, that the defendant had used the money, for if he had kept it in the office, no interest would be due. The defendant then, had departed from his duty in two particulars, first in using the money so as to make him chargeable with interest, and secondly, in paying to Jesse L. Pool, without any authority from the Court.

We concur with his Honor, that the defendant is justly chargeable with interest on the sum paid to Jesse L. Pool.

Per Curiam. Judgment affirmed.

HARBARD SPENCER *vs.* GEORGE HUNSUCKER

A Justice of the Peace has not jurisdiction of such a contract as this: "I, the subscriber, promise H. S. that, if he can make it appear, that I had in my hands as constable for collection three notes for $75 each, in favor of the administrators of S. S. deceased, against J. S. and others, and endorsed by B. B., then and on that evidence, I am to stand indebted to him, H. S. for one of said notes, and interest thereon from April 26th, 1842."

Appeal from the Superior Court of Law of Moore County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This suit was commenced before a Justice of the Peace by warrant in "debt for $75 due by assumpsit." After judgment and appeals, the cause came on for trial in the Superior Court on *nil debet;* and on the trial, the plaintiff gave in evidence a written instrument, signed by the defendant, in the following words; "I, the subscriber, promise H. Spencer, that if he can make it appear, that I had in my hands as constable, for collection, three notes, for $75 each, in favour of the administrators of Samuel Smotherman deceased, against Jacob Stutts and others, and endorsed by B. Barret, then, and on that evidence, I am to stand indebted to him, Spencer, for one of said notes, and interest from April 26th, 1842."

Several objections were taken to the plaintiff's recovery; and among them was one, that the case was not within the jurisdiction of a single magistrate. After a verdict for the plaintiff, subject to the opinion of the Court, on the points made, the presiding Judge set aside the verdict, and, according to an agreement of the parties, ordered a non suit; from which the plaintiff appealed.

Haughton, for the plaintiff.

Strange, for the defendant, argued—

1. An action of debt would not lie, because the claim was neither for a specific sum nor a specific article.

2. Justice of the Peace had no jurisdiction. *Rev. Stat. Ch.* 62, *Sec.* 6. *Bryan* v. *Washington*, 4 Dev. 479. *Fentress* v. *Worth*, 2 Dev. 229.

3. That the condition on which the plaintiff's cause of action must arise, if it arose at all, had not been performed when the action was brought. *Smith on Contracts*, 329. *Chitty's Plead.* 309, 11. *Callond* v. *Briggs*, 1 Salkeld, 113. *Thorpe* v. *Thorpe*. 1 Salk. 171.

Ruffin, C. J. Without adverting to the other objections, the Court deems that upon the question of jurisdiction, fatal to the action,

It is first to be noted, that this is not within that provision in the Act, which makes, "demands due on special contract or agreement," cognizable before a magistrate out of Court; because that clause is restricted to demands of $60, or under, and this contract and action are for $75. The question is, whether it falls within the other clause, which embraces debts, whereof the principal does not exceed $100, "due on bonds, notes, and liquidated accounts." We think, it does not. This contract is not a bond; not being under seal. Nor is it a note, in the sense of the statute; which means, like the Acts of 1762, and 1786, by that word, "note," a promissory note for money. That is the legal import of the term *per se;* and the construction is the clearer upon this statute, from the contrast in the language of the two clauses in this section, which relate to the several classes of debts, of $60, and of $100: that of the former being "special contract, note, or agreement" generally, while that of the latter is confined to the specific forms of contracts, "bonds or notes," in their technical sense. Still less can this instrument be called "a liquidated account;" which the Statute

itself defines to be an account stated in writing and signed by the party from whom the debt shall be due. This imports an amount or balance, ascertained to be due on account, from the one party to the other; and it excludes the idea of an original contract whereby one person engages to pay a sum of money to another on a certain contingency, in the nature of a wager.

Such a case, is not within the purview of that part of the Act.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF JACOB HUBBARD *vs.* STEPHEN WALL'S EX'RS.

In an action upon a constable's bond for not collecting bonds, notes, &c. placed in his hands for collection, after a sufficient time has elapsed for that purpose, it is incumbent on him or his sureties to shew that he could not have collected the money, by reason of the insolvency of the debtor or otherwise, and, also that he had returned, or offered to return, the security for the debt to the creditor, otherwise he and his sureties will be liable for the amount.

The cases of *Wilson* v. *Coffield*, 5 Ired. 515. *State* v. *Johnson*, 7 Ired. 78, cited and approved.

Appeal from the Superior Court of Law of Richmond County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

The following case was reported by the presiding Judge.

This was an action of debt on a bond, executed by the testator of the defendant on the 16th of April, 1839, as one of the sureties of one Sedbury, a constable. The breaches assigned were as follows: *First*, that the constable had collected the money on a claim put into his hands by the relator, and had failed to pay it over: *Secondly*, that he had failed to use due diligence in collecting the said claim: *Thirdly*, that he had failed to return the note. On the trial it appeared, that the relator had placed in the hands of the constable, on the 1st of February, 1840, a note on John and Jane McAlister for the sum of $75, and took his receipt therefor, in which it was set forth, that he, the said constable, would collect or return the said note. It also appeared, that Sedbury had been appointed a constable and had given his bond in 1840, and had run off before the commencement of this action, which was on the 23d of July, 1845. It also, appeared in evidence, that sometime in 1845, the relator called on the testator of the defendant, and demanded of him the money on account of a note he had placed in the hands of the said Sedbury. It did not appear on the trial, that the constable had collected the money from the McAlisters, nor was it made to appear that they had any property, out of which the debt could be made.

On this state of facts, the Court was of opinion and so charged, that the relator was only entitled to nominal damages on the breach assigned for not returning the note, and the jury so found.

The plaintiff appealed from the judgment rendered on the verdict, on the ground of misdirection by the Court.

Winston, for the plaintiff.

Strange, for the defendant, cited *State* v. *Skinner*, 3 Ired. 564.

NASH, J. This was an action of debt on the official bond of one Sedbury, a constable, to which the defendant's testator was a surety. The case states that in April 1836, the relator put into the hands of Sedbury a note for $75, upon John and Jane McAlister, and took his receipt to collect the money or return the note. In 1845, a demand was made upon the surety for the money, the constable having previously run away. The case then proceeds—"It did not appear upon the trial, that the constable had collected the money from the debtors, the McAlisters, nor was it made to appear that they had any property out of which the debt could be made," and for these reasons, "the Court charged the jury, that the relator was entitled only to nominal damages, for not returning the note."

The 3rd breach assigned in the plaintiff's declaration, was for not returning the note. The first, for collecting the money, and not paying it over. As the fact assigned as the 3rd breach, is necessarily connected with the first assigned, in the view we have taken of the case, we shall not give it a separate and distinct consideration. His Honor charged the jury, that it did not appear that the constable had collected the money from the debtors, the McAlisters. In this, we think there is error. If he meant that there was no direct proof of that fact, he was right; but there was no necessity for such evidence, to enable the plaintiff to recover for the first breach. If he did not so mean, the language was well calculated to mislead the jury, and must have had that effect, as they gave nominal damages only, for not returning the note—in compliance with the charge as to the 3rd breach. That there was evidence to go to the jury, and which ought to have been submitted to them, is evident from the facts stated in the case. Near, if not quite, six years had elapsed, after Sedbury received the note, before this action was brought, and upon the trial it was not produced, nor offered to be surrendered up; nor was any account given of it. The

constable had run away, and had either taken the note with him or received the money and converted it to his own use, before he did so. The case of *Wilson* v. *Coffield*, 5 Ired. 515, is a direct authority upon this point. There, the constable had, in February 1838, received from the plaintiff a judgment to collect, and the action was brought in 1844. This Court decided that the Judge might have instructed the jury, that from the length of time, which had elapsed, the law presumed the constable had received the money. This presumption arises from the fact, that when the action is brought, the note is neither surrendered to the plaintiff, nor is it in any way accounted for. His Honor laid upon the constable the duty to show he had not collected the money. The plaintiff has not been placed by the constable, in the situation in which he was, when the agency was assumed, and which he had a right to require. There was then evidence to go to the jury, that Sedbury had collected the money. This action is against the surety, but it is not denied, that he must stand in the shoes of his principal; it was his duty to see that the constable, not only paid over all the money, which he had collected, to the persons to whom due, but, also, that all evidences of debt, placed in his hands for collection, be returned to their respective owners, at the expiration of his official year. *State* v. *Johnson*, 7 Ired. 78. We are of opinion that the presiding Judge erred in the instruction he gave the jury.

Per Curiam. Judgment reversed, and a *venire de novo* ordered.

THE STATE *vs.* TIMOTHY ANDERS & AL.

In a case of forcible entry and detainer, a magistrate has no right to award restitution, unless the jury have found by their verdict, that the complainant had *some estate* in the land, either a freehold or for a term of years.

Without such finding the magistrate may bind over the defendant to the Court to answer to an indictment for the forcible entry; but, without such finding, he has no jurisdiction to oust the defendant of his possession and put the complainant in. If he does so, he is himself liable to an indictment for forcible entry.

The cases of *Mitchell* v. *Fleming*, 3 Ired. 123, and *State* v. *Nations*, 1 Ired. 325 cited and approved.

Appeal from the Superior Court of law of Bladen County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This is an indictment for a forcible entry by the defendants upon the possession of one Flynn, and on the trial, it was fully proved. On behalf of the defendants, it appeared, that an inquisition of forcible entry and detainer, at the instance of the defendant Anders, had been taken on the premises, under which said Flynn was ousted; that it had been returned to the Clerk of the Superior Court of Bladen, and by the Counsel for the State it was admitted, to have been lost or mislaid, but the regularity of said requisition was denied. In proving its contents, it appeared, that a jury had been summoned; that they appeared on the premises; that they were sworn by the magistrate; that said Flynn was present; that they returned their verdict in these words—"the jury find that said Flynn, entered peaceably, but held the premises by force;" that the magistrate adjudged that restriction should be made, and thereupon the said Flynn was put out of possession, and the said Anders, put in, by the defendants.

It did not appear that said Anders made any affidavit or written complaint before the magistrate, on which said inquisition was founded. And it appeared that the jury had been summoned by a constable. The Court was of opinion that a constable was not the proper officer intended by the Statute to summon the jury, and that an affidavit in writing ought to have been made before the magistrate by said Anders, to authorise the proceedings. And the Court, in direct terms, charged, that as the verdict of the jury did not find that said Anders had any estate whatever in the land, of which he sought to dispossess said Flynn, the award of restitution by the magistrate was null and of no effect, and offered no protection to the defendants. Under this charge, the jury returned a verdict of guilty against the defendants. A rule for a new trial was moved for, because of misdirection, which on argument was discharged.

Judgment was pronounced against the defendants, and thereupon the defendants, Anders and Evans, appealed to the Supreme Court.

Strange, for the appellant argued,

That they were not guilty, because the magistrate was acting in a judicial capacity and every thing done by his authority, under his judgment, was valid till reversed in some proper proceeding, and neither he, nor any acting under him, were subject to suit or indictment. *Cunningham* v. *Dilliard*, 4 Dev. & Bat. 351. *Floyd* v. *Barker*, 12 Coke 23. *Dr. Greenwell* v. *Dr. Burwell & others*, 1 Ld. Raym. 468.

That a judgment cannot be impeached collaterally. Lord MANFIELD'S *dictum* in *Moses* v. *McFarlane*, 2 Bur. 1009. *O'Hara* v. *Hall*, 4 Dall. 340. *Johnson* v. *Johnson*, 3 Bos & Pull. 169. *Marriott* v. *Hampton*, 7 T. R. 565. *Phillips* v. *Hinton*, 2 H. Black. 402. *Hammond's N. P.* 48 56. *Jones* v. *Judkins*, 4 Dev. & Bat. 454. *Cobb* v. *Kornegay & others*, 6 Ire. 358.

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That in this matter the proceedings were of record, and that the magistrate acted judicially. 1 *Haw. P. C. Ch.* 28, *Sec.* 8. *Rev. Stat. Ch.* 49, *Sec.* 7.

The *Attorney General*, in reply.

As to the 1st point, he referred to *State* v. *Nations*, 1 Ired. 329. *Mitchell* v. *Fleming*, 3 Ired. 123.

2nd. 2 *Chitty's Gen. Practice*, 240. *King* v. *Wilson*, 3 Adolphin & Ellis, (30 *Eng. C. & Rep.* 229.) *Respublica* v. *Campbell*, 1 Dall. 354.

3rd. 4 *Wentworth's System of Pleading*, *p.* 132—precept directed to the Sheriff. *State* v. *Nations.*

Rev. Stat. Ch. 31, *Sec.* 43. "Other officer," means Coroner.

Ch. 81 *Sec.* 59; "proper officer," refers to Sheriff or Coroner.

Ch. 26, *Sec.* 2 *and* 3. "Sheriff a proper officer," means Coroner. Constable cannot execute such process.

Ch. 109, *Sec.* 11—Coroner to act as Sheriff in case of vacancy.

Rev. St. Ch. 10, *Sec.* 1 *and* 2—"other officer" cannot mean constable.

1 *Hawkins, Ch.* 26—constable an inferior officer.

DANIEL, J. The defendants, with force and arms, and with a strong hand, entered upon the premises of one Flynn, and him dispossessed, and took possession of the messuage and appurtenances, and have held them up to this time. The defendants insisted that their entry was *lawful;* and they introduced, as evidence on the trial, the proceedings which had taken place on a warrant for a forcible entry and detainer, which had before that time been issued by Evans (a Justice) at the instance of Anders; all of which, is stated in the case.

The Judge was of opinion, that Evans, the Justice, had no power to restore Anders, by force of those proceedings, because, if all other things had been correctly done, the

jury by their verdict had not found that Anders had any *estate*, either of freehold, or for a term of years in the land. We concur with his Honor; the very question was decided by this Court in *Mitchell* v. *Fleming*, 3 Ired. 123. In that case we said, that before a writ of restitution can be awarded, the jury must find by their verdict, that the party, forcibly dispossessed, had either a freehold, or a term for years in the land, of the possession of which he had been deprived. In the case of the *State* v. *Nations*, 1 Ired. 325, this Court held the same doctrine.

But it is insisted, that the Justice, (although he personally assisted Anders in gaining possession, in the manner described in the indictment) is not liable in law to be indicted, because he acted under ignorance of the law, or error in judgment. The justice had power to enquire, whether Flynn had made a forcible entry upon the possession of Anders, and, if the evidence satisfied him that the fact was so, he might have bound him over to Court, to have been indicted for a forcible entry. This course he did not pursue, but he forcibly dispossessed Flynn, and put Anders into possession. This was not an error in judgment; it was an act the statutes gave the Justice no power or authority to do; his action in the matter was not voidable, but was absolutely void, and tortious. Without the finding by the jury of an estate for years, at least, in Anders, the Justice had jurisdiction to bind the offender to answer personally for the offence of forcible entry. But without such finding he had no jurisdiction to oust Flynn of his possession, and put Anders in. It is, therefore, not a case of error of judgment of a judicial officer, upon a matter within his jurisdiction, but of usurpation of power, beyond his jurisdiction.

We think the judgment must be affirmed.

PER CURIAM. Judgment affirmed.

STATE *vs.* SPENCER S. REEVES.

Where the record of the proceedings on an indictment for murder, uses the past tense, instead of the present, this is not error

Where a prisoner, indicted for murder, upon his arraignment pleads not guilty, "and for his trial puts himself *on his country*," this is sufficient without his saying "*on God and his country.*"

The case of *State* v. *Martin*, 2 Ired. 101, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

The case was this. After a conviction of murder, the prisoner moved in arrest of judgment; and, after the motion was overruled, and sentence passed on him, he appealed. The motion was founded on two reasons. The one, that in several instances the proceedings are stated in the record, in the past, instead of the present, tense. The other, that in that part of the record, which contains the arraignment, and plea of the prisoner, it is stated, "and thereof, and for his trial, the said Spencer S. Reeves, puts himself upon the country;" whereas it should have been, that the prisoner said, that he would "be tried by God and the Country."

Attorney General, for the State.
Morehead, for the defendant.

RUFFIN, C. J. There is no force in either of the reasons in arrest. That respecting the tense, was taken and over-ruled in *Martin's case*, 2 Ired. 101. As to the other point, the record is right, in its present form. The enquiry, how the prisoner will be tried, which tenders to him an election as to the mode, had its origin, doubtless, in his

right anciently to a trial by jury or by battle. But, though still made, in deference to long usage, that enquiry, and the answer to it are held, at this day, an unmeaning ceremony; as we have but one method of proceeding for capital felonies, which is by indictment and trial by jury. Indeed, although the old forms are adhered to in England, in the oral proceedings in the arraignment of the accused and taking his plea, yet the only note of them made at the time, is a memorandum by the clerk on the indictment—"po. se."—meaning, that the prisoner put himself (*ponit se*) upon the country. 1 *Chit. C. L.* 416. And in the best formularies of engrossed records, no notice is taken of any part of that ceremony, subsequent to the plea; but they merely state, that "being demanded concerning the premises, &c., how he will acquit himself thereof, he saith, *that he is not guilty thereof*;" and thereof, for good and evil, *he puts himself upon the country*;" and then, after an entry of the *similiter*, (which, indeed, may be omitted, without error,) there follows immediately the award of the *venire*. 4 *Bl. Com.* 340, *Appendix* 3. Whether regard be had, then, either to the substance or the forms of the proceeding, it is only necessary, that there should be a plea of not guilty, tendering a proper issue to the country.

It must, therefore, be certified to the Superior Court, that there was no error in passing judgment of death on the prisoner, to the end that it may be carried into execution.

Per Curiam. Ordered to be certified accordingly.

THE STATE *vs.* WILLIAM DANIEL.

Where in a criminal case, in which, after conviction, the defendant has been sentenced to imprisonment, and he appeals merely for delay, without filing any exceptions or making any defence in point of law, the Supreme Court thinks this an abuse of the right of appeal, and that the Superior Court should not admit the convict to bail during the pendency of the appeal.

Appeal from the Superior Court of Law of Person County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

This was an indictment against the defendant for an assault and battery, and, upon not guilty pleaded, he was convicted; and the Court sentenced him to pay a fine of one hundred dollars and be imprisoned ten days, and enter into bond for his good behaviour, &c. From this judgment the defendant prayed an appeal to the Supreme Court, which was granted upon his giving the usual appeal bond, conditioned that "he would abide by the sentence, judgment or decree of the Supreme Court in the said suit." No exception was made to the Judge's charge, nor any motion in arrest of judgment made.

Attorney General, for the State.
No counsel for the defendant.

RUFFIN, C. J. The defendant was indicted for a battery on one Hopkins, and was convicted on not guilty pleaded, and sentenced to pay a fine of $100, and be imprisoned ten days, and he appealed to this Court.

Of course, the conviction is to be presumed right, in point of law, as well as in point of fact, since the defendant tendered no bill of exceptions. Therefore, there cannot be a *venire de novo*. Nor does the Court find any error in the record, for which the judgment should have been arrested. Indeed, none has been suggested on the part of the defendant; but he has given up the case. We conclude that the appeal was for delay merely; and we notice it merely for the purpose of expressing our disapprobation of such an abuse of the right of appeal, and intimating the propriety in such cases of preventing it by the Superior Courts refusing to let a convict to bail, since thereby the purposes of the law in requiring offenders to be punished, are, in a considerable degree defeated, and the law evaded, and brought into contempt.

The usual certificate, that there is no error in the judgment, must be sent to the Superior Court, to the end that farther proceedings may be had there according to law.

PER CURIAM. Ordered accordingly.

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THE STATE *vs.* JOHN POTEET & AL.

On the trial of an indictment, under the Statute, for fornication and adultery, it is not necessary to shew by direct proof the actual bedding and cohabiting; it is sufficient to shew circumstances from which the jury may reasonably infer the guilt of the parties.

Where on such a trial a witness testified that he went early one morning to the house of one of the defendants, and on knocking was after some hesitation admitted by the other defendant, the female, who came to the door, with her frock on but unfastened—that the male defendant was in the only bed in the room—that the shoes of the female were near the head of the bed, and that the bed seemed to be very much tumbled. *Held*, that the Judge did right in refusing the instruction, prayed for by the defendants, that there was no evidence from which the jury might infer the criminality of the defendants.

Appeal from the Superior Court of Law of Caswell County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

This was an indictment under the section of the Revised Statutes, concerning fornication and adultery, to which the defendants pleaded not guilty. On the trial the State examined a witness, by the name of Willis, who testified, that, on the morning preceding the last Easter, he, in company with another individual, went to the house of the defendant Poteet, at a very early hour between day-break and sun-rise, and knocked at the door of the room, in which this defendant was in bed; and, on knocking, he heard the voice of the defendant, Martha Hooper, refusing admission, but the defendant, Poteet, told her to open the door and let the witness in. She accordingly opened the door, and the witness entered the room, and found Poteet in bed, the bed very much tumbled; the defendant, Martha, had on her frock, but it was not fastened, and her shoes were also off and were lying in the corner near the head of the bed. This witness further testified

on cross-examination, that there were two other rooms, adjoining the room in which he saw the defendants, the doors of which were closed, and he could not see whether there was a bed in either of the rooms or not. He was asked if the defendant Martha lived with Poteet, and he replied that he had seen her there several times, when passing, but could not say whether she lived there or not. Another witness for the State testified substantially to the same facts, except, that, in regard to the shoes of the defendant Hooper, as to which he stated, that they were lying in the corner, when he and the first witness went into the room, but said nothing about their being near the bed. A third witness testified that the defendant, Martha, had lived in the house with the defendant, Poteet, for four or five years, and that she had been married, but her husband was dead.

The defendant's counsel insisted that there was no evidence to be left to the jury, tending to shew the guilt of the defendants, and asked the Court so to charge.

The Court declined giving the instruction asked for, but charged the jury, that, before they could convict, they should be satisfied from the evidence, that there was an habitual criminal intercourse between the parties, or a surrender of the person of the one to the gratification of the other. The jury returned a verdict of guilty, and from the judgment pronounced thereon by the Court, the defendants appealed.

Attorney General, for the State.
Morehead, for the defendants.

Daniel, J. There was no express evidence to prove, that the defendants "bedded and cohabited together." But, in the absence of express and positive testimony, the law authorized the conviction of the defendants on presumptive evidence, if it was so strong as to leave no reasonable doubt on the minds of the jury, that they were

guilty. The Court is of opinion, that the facts and circumstances, proved on behalf of the State, all tended to support the charge in the indictment, that the defendants did bed and cohabit together; and that the Judge could not have said, that there was *no* presumptive evidence to support the indictment. The weight of the evidence was left to the jury; they convicted the defendants, and the Court rendered judgment, which we affirm.

PER CURIAM. Ordered to be certified accordingly.

DEN ON DEMISE OF WILLIAM AND ABNER WEATHERLY *vs.* SOLOMON ARMFIELD.

A. in 1817 devised as follows, "I give to my son I. the tract of land he now lives on; but if he should die without an heir, the land then to be divided between my two sons A. and W." *Held*, that the limitation over was too remote, the devise to I. creating an estate tail, which by our Act of Assembly is converted into a fee simple

The cases of *Davidson* v. *Davidson*, 1 Hawks. 163. *Sanders* v. *Hyatt*, Ibid. 247, *Hollowell* v. *Kornegay*, 7 Ire. 261, cited and approved.

Appeal from the Superior Court of Law of Guilford County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

This was an action of ejectment in which the parties agreed upon the following facts.

Isaiah Weatherly, the elder, was seized of the premises in fee, and devised them on the 5th day of September, 1847, as follows: "I give to my son Isaiah the tract of

land he now lives on; but if he should die without an heir, the land then to be divided between my two sons, Abner and William." Isaiah, the son, enjoyed the premises during his life and died without ever having had a child, and the defendant claims under him. The testator's two sons, Abner and William, to whom the premises were limited over, are the lessors of the plaintiff. Upon not guilty pleaded, the plaintiff was non-suited in the Superior Court, and appealed.

Morehead, for the plaintiff.
Iredell, for the defendant.

RUFFIN, C. J. The limitation over is clearly too remote, and the whole estate vested absolutely in the first taken. "Heir" means heir of the body in this will, as the gift over, upon the death of one son, "without an heir," is to his two brothers. There is nothing in the will to enable us to read "child" or "children" for "heir;" and in its proper sense of "heir of the body," Isaiah the son took a fee by force of the Act, which turns estates tail into fee-simples. This conclusion is supported by several cases, which are directly in point. *Davidson* v. *Davidson*, 1 Hawks. 163. *Sanders* v. *Hyatt*, Ibid. 247. *Hollowell* v. *Kornegay*, 7 Ire. 264.

PER CURIAM. Judgment affirmed.

RICHARD SNEED *vs.* ROBERT A. JENKINS.

In an action upon a covenant for rent contained in a lease, it is competent for the defendant to shew, that, at the time of its being made, the plaintiff had no title; provided he can shew at the same time that, in consequence thereof, he could not enter, or having entered he was evicted by a paramount title.

In every plea of eviction there must be an averment, that the lessor had not a perfect title, when he demised; and it must also be added, that, in *consequence*, the lessee was evicted. The whole is the defence.

Appeal from the Superior Court of Law of Granville County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

This was an action for the breach of a covenant for the payment of rent, contained in a lease. The plaintiff, by deed, leased to the defendant a tract of land for the year 1842, reserving a rent of $125, which the defendant covenanted therein to pay. The defendant entered into and kept quiet possession of the land, for the period for which it was leased. The action is brought on the covenant, to recover the rent. On the trial it appeared that the legal title to the premises, at the time the lease was made, was not in the plaintiff, but in another person, whose agent, before the expiration of the defendant's term, sold the land, at public auction, when the defendant and his father became the purchasers. It was further shown, that at the request of the plaintiff, and of the father, Robert Jenkins, the agent, at the time of the sale, expressly reserved to the defendant, the right to the possession during his term, then unexpired. The defendant relied upon the plaintiff's want of title, to defeat the action.

His Honor charged the jury, that, upon this state of facts, the plaintiff was entitled to recover, and the Jury

found a verdict for him. From the judgment thereon the defendant appealed.

Badger and *Mangum*, for the plaintiff.
E. G. Reade and *Iredell*, for the defendant.

NASH, J. The covenant to pay being in the lease, and not in a distinct and separate obligation, it was competent for the defendant to show, in an action upon the lease, that, at the time of its being made, the plaintiff had no title; provided he could show, at the same time, that in consequence thereof he could not enter, or, having entered, he was evicted by a paramount title; for it is upon the title of the lessor, and the enjoyment of the premises by the lessee, that the landlord's right to the rent depends. In truth, in every plea of eviction there must be an averment that the lessor had not a perfect title, when he demised; but that fact alone is not sufficient. To constitute a perfect plea, it must be added, that, in *consequence*, the lessee was evicted—the *whole* is the defence. 6 Taun. 534, *Taylor* v. *Tamina*. There is not that union here. The plaintiff had not the title, but the lessee has not been evicted; on the contrary, he has enjoyed his term, and received all the benefit he was entitled to under his lease, and cannot be permitted to set up his landlord's want of title, in defence. *Hodson* v. *Sharpe*, 10 East. 353. But in addition to this, at the time of the sale, by the agent of the owner, his right of possession under his lease, during the term, was recognized and expressly reserved to him, at the request of the plaintiff and his father, who was a joint purchaser with him. If not bound under his covenant, to pay the present plaintiff, he will have enjoyed the use of the premises, without paying rent to any one.

We perceive no error in the opinion of the Judge, who tried the cause.

PER CURIAM. Judgment affirmed.

CULLEN SMITH *vs.* CALEB SMITH.

Error will not lie for a refusal to non-suit, except in a few cases in which the duty is imposed by statute.

A verdict on the merits of the case is to be set aside only for an error of the Court practically prejudicial.

In an action of slander, charging that the defendant, speaking of a particular suit, affirmed that the plaintiff "had sworn to a lie," the particular evidence given by the plaintiff on the trial of the suit is never set forth in the declaration, and therefore need not be proved.

If the defendant had, in speaking the words, gone on to specify the matters testified by the plaintiff and the point on which he had sworn falsely, then it would have been incumbent on the plaintiff to have set forth the whole truly in his declaration; and if, upon the whole thus stated and proved, the matter to which the alleged false oath related, appeared to be immaterial, the action could not be maintained.

In actions of slander, evidence of the truth of the words spoken cannot be received under the general issue, even in mitigation of damages; though evidence of general bad character may be so received.

Whether after the defendant has closed his evidence, the Court will permit the plaintiff to offer evidence which might have been offered in the first instance, is a matter of discretion for them, and their decision cannot be revised by an appellate Court.

The cases of *Whitaker* v. *Carter*, 4 Ired. 461, and *Kelly* v. *Goodbread*, No. Ca. Term Rep. 28, cited and approved.

Appeal from the Superior Court of Law of Pitt County, at the Fall Term, 1847, his Honor Judge BATTLE presiding.

The action is for slander, in indirectly imputing to the plaintiff the crime of perjury, by saying to him, when speaking in reference to the trial of an indictment against one Bryant Adams, and to the examination of the plaintiff as a witness on the trial, "You swore to a lie, and I can prove it." Plea, not guilty.

In support of his declaration, the plaintiff gave in evidence, the record of an indictment against Adams for a battery on the present defendant, on which there was a

trial and acquittal, on not guilty pleaded; and proved that he, the plaintiff, was sworn and examined as a witness for Adams. He also gave evidence, that the day after the trial, the present defendant, speaking in reference to it, and to the examination of the plaintiff on it, said to the plaintiff, "you swore to a lie, and I can prove it."

The plaintiff there stopped his case; and thereupon the counsel for the defendant insisted, that the plaintiff was bound further to shew, what evidence he gave on the trial of Adams; so that it might appear to have been to some material point; and for the want of such proof, he moved the Court to nonsuit the plaintiff. The Court refused the motion.

Then, for the purpose of shewing that he did not intend to charge the plaintiff with perjury, but with a mistake only, and to rebut the imputation of malice, the defendant gave evidence, that on the trial of Adams, he, the defendant, was a witness for the State and swore, that Adams struck him, and that the plaintiff swore that Adams did not strike him.

The defendant, for the purpose of further rebutting the imputation of malice, and mitigating the damages, offered to prove also, that Adams did, in fact, strike him. To that evidence the counsel for the plaintiff objected; and the Court refused to admit it.

The plaintiff then offered evidence, that the defendant had subsequently repeated the charge against him. The counsel for the defendant opposed its reception, on the ground, that, after having once closed his case, the plaintiff could not give evidence of malice in the defendant. But the presiding Judge admitted it, in answer to that given on the other side, for the purpose of shewing the absence of malice. There was a verdict for the plaintiff and from the judgment the defendant appealed.

Stanly, for the plaintiff, argued,

As to the first point in the case referred to, *Whitaker* v. *Carter*, 4 Ired. Rep. 461. *McDonald* v. *Murchison*, 1 Dev. 9.

As to the 3d point—it is submitted that to have allowed the testimony to be received which was offered by defendant, would have been, in effect, giving in evidence the truth of the words under the general issue. Referred to *Meeds* v. *Carver*, 7 Ired. 273. 2 *Saun. Pl. & Ev.* 812. 1 *Chit. Pl.* 499. *Ramsey* v. *Webb*, 41 Eng. C. L. Rep. 63.

As to the 4th point, he referred to, *Parish* v. *Fite*, 2 Mur. 258. *Kelly* v. *Goodhead's* Ex. N. C. T. R. 28. *State* v. *Sparrow*, 3 Mur. 487. *State* v. *Silver*, 3 Dev. 332. *Brown* v. *Giles*, 1st C. & P. 18, (11 E. C. L. Rep. 337.) *Rex* v. *Hilditch*, 24 E. C. L. Rep. 330.

No counsel for the defendant.

RUFFIN, C. J. There are several reasons why the defendant can take nothing on his first point.

In the first place, error will not lie for a refusal to nonsuit; because the Court is not bound to do so in any case, but has the discretion to leave the matter to the decision of the jury; except in the few cases, in which the duty is imposed by statute. The defendant should have asked an instruction to the jury, and then he might have brought his case here, for a wrong direction given, or a right one refused. In the second place, if the objection had been good at the time it was taken, it was immediately overruled by the defendant's own proof, that the evidence of the plaintiff on the trial of Adams was material, and, indeed, that it went to the gist of the matter. The defendant, himself, thus shews, that the error, of which he complains, if an error at all, was merely abstract and harmless in this case, under the facts actually existing; and a verdict on the merits is to be set aside, only for an error practically prejudicial.

But, lastly, the decision was not erroneous, but perfectly correct in itself. The plaintiff was not bound to prove more, than his declaration ought to contain. As the words did not directly import a charge of perjury, but only that the plaintiff was foresworn, it was necessary to allege, as inducement, that there was a judicial proceeding, in which the plaintiff gave evidence as a witness, and that the defendant referred to that in making the charge. But the particular evidence given by the plaintiff is never, we believe, set forth in the declaration; and therefore need not be proved. In practice, plaintiffs have never been called on for such proof. The precedents contain, after the inducements and colloquium, the words spoken, and the averment, that the defendant thereby meant to charge, that the plaintiff in giving his evidence committed perjury. *Whitaker* v. *Carter*, 4 Ired. 461, 2 *Chit. Pl.* 621. If, indeed, the defendant had, in speaking the words, gone on to specify the matters testified by the plaintiff, and the point in which he had sworn falsely, then it would have been incumbent on the plaintiff to have set forth the whole, truly, in the declaration; and if, upon the whole thus stated and proved, the matter, to which the alleged false oath related, appeared to be immaterial, the action could not be maintained, since no intention to charge a perjury can be inferred from words, that, taken together, legally import, that there was no perjury.

But this defendant charged in general terms, that, in the evidence, which the plaintiff gave, as a witness, in the prosecution against Adams, he "swore to a lie;" which, connected with the inducement, the colloquium, and the innuendo, imports the charge of perjury, and imposes it on the defendant to shew what the plaintiff did swear, and that it was corruptly false. Hence, the defendant, in his plea of justification, must state the evidence given by the plaintiff, and then negative the parts, in which it is

alleged the perjury consisted, just as in an indictment for that offence. 3 *Chit. Pl.* 1033, 1037. To this effect the language of Mr. Justice Ashurst in *Coleman* v. *Godwin*, is very pointed, as quoted by Chancellor Walworth in *Power* v. *Price*, 16 Wen. 450. "The effect of the words upon the hearers, is what is to be considered; and the determinations in the old books, are a disgrace to the law. If one charges a witness with having sworn false in relation to a particular fact in a cause, which fact would not necessarily be immaterial and irrelevant, the natural effect of the words is to convey, to those who hear them, the impression, that the witness has committed perjury; and if the defendant wishes to shew that he did not intend to impute the crime of perjury to the plaintiff, but merely that he had perverted the truth in relation to an immaterial fact, the burden of showing that the fact testified to was not material to the issue, and that it was not intended to impute to the plaintiff false swearing in the suit in the ordinary sense of the term, rests upon the defendant." And that doctrine is fully sustained in *Power* v. *Price*, by the Chancellor and the majority of the Court. The plaintiff, therefore, gave all the evidence the law required of him, and it would have been erroneous to nonsuit him.

In actions of this kind, evidence of the truth of the words, cannot be received under the general issue. *Smith* v. *Richardson*, Willes Rep. 20, and *Underwood* v. *Parks*, Str. 1200, are the leading cases on this subject. They were decided upon consultation of all the Judges, and have been considered ever since, as settling the point. *Roberts* v. *Camden*, 9 East. 92. Evidence of bad character may reasonably be heard in mitigation of damages; because less is due to a blemished than an unblemished name, and one is supposed to be at all times prepared to establish his general character. But unless the defendant pleads the truth of his charge, it would be a surprise on the other party to allow him to give evidence of it.

And as to its repelling the implication of malice, which is incident to the publication of a slander, it has no such effect. For, as was well observed by Mr. Justice Holroyd in *Fairman* v. *Ives*, 5 Barn. & Ald. 645, by showing the truth of the slanderous matter, which is the subject of the action, you do not show that it was not maliciously spoken or published, but merely that the party is not entitled to damages, because he is guilty of the charge imputed to him. There is often as much malice, ill will, and design to hurt, towards another, in speaking truly, as falsely, to his disparagement.

The last evidence given by the plaintiff was properly admitted as evidence in reply to that of the defendant, as mentioned by his Honor.

But if it had not been of that character, its reception could not constitute an error, for which the judgment might be reversed. The evidence was in its nature competent; and the objection to it was solely the period at which it was offered. Now, that concerns only the orderly proceeding in trials; about which there is no positive rule of law, like those touching rights, but only a course of the Courts established for convenience and dispatch of business. To that course, the Courts generally, and very properly, adhere with strictness. But from it, they in their discretion sometimes may, and under circumstances which require it, will depart, for the advancement of justice; and an appellate Court cannot undertake to control or regulate the discretion. It is the more safely and beneficially exercised by those who preside at trials, and can best appreciate, both the inconvenience from, and, in particular cases, the necessity for, admitting an irregularity of proceeding. *Kelly* v. *Goodbread*, N. C. T. R. 28.

Per Curiam. Judgment affirmed.

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THE STATE *vs.* THOMAS NASH.

In an indictment for a capital offence, the Court having previously ordered one hundred tales jurors to be summoned, on the trial the original pannel was first perused and exhausted, and the Court then directed thirty-six of the tales jurors to be drawn, and, these being exhausted by challenge, directed the remaining tales jurors to be drawn, the prisoner at the time making no objection; *Held*, that there was no error in this nor ground for a new trial.

The mother of the prisoner being introduced by him to prove an *alibi*, the Court charged the Jury "that the law regarded with suspicion the testimony of near relations, when testifying for each other, that it was the province of the jury to consider and decide on the weight due to her testimony, and, as a general rule, in deciding on the credit of the witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify in relation to the transaction, and the relation in which the witness stood to the party;" *Held* that this charge was not erroneous.

The cases of *State* v. *Ellington*, 7 Ired. 61, and *State* v. *Lytle*, 5 Ired. 61, cited and approved.

Appeal from the Superior Court of Law of Montgomery County, at the Fall Term, 1847, his Honor, Judge CALDWELL, presiding.

The prisoner was indicted for Murder. The day before the trial, the presiding Judge, at the instance of the Solicitor of the State, ordered a special writ of *venire facias* to issue to the Sheriff, commanding him to summon one hundred Jurors. In forming the petit jury, the original pannel was first perused, and, a jury not being made, the clerk was directed by the Court to put into the box, from whence the names of the jurors were drawn, thirty-six scrolls, containing the names of that number of the special venire. This was done, and *they* were all drawn, without making a jury, because of the challenges. The scrolls, containing the names of the remainder of the special *venire*, were then put into the box, by the order of the Court, out of which, a jury was made. To this mode

of making up the jury, no objection was made at the time, or during the trial.

On the trial, the prisoner introduced his mother as a witness, to prove an *alibi*, and she swore to his absence at the time, it was alleged, the murder was committed. The Court charged, "That the law regarded with suspicion the testimony of near relations, when testifying for each other; that it was the province of the jury to consider and decide on the weight due to her testimony, and, as a general rule, in deciding on the credit of the witnesses on both sides, they ought to look to the deportment of the witnesses, their capacity and opportunity to testify, in relation to the transaction, and the relation in which the witness stood to the party."

The prisoner was convicted, and moved for a new trial for error of the Court in forming the jury, and error in the charge. This motion was over-ruled, and the prisoner then moved in arrest of judgment, and, that being refused, appealed.

Attorney General referred to the following cases:

1st point. *State* v. *Benton*, 2 D. & B. 196. *State* v. *Ward*, 2 Hawks, 443.

2nd. *State* v. *Ellington*, 7 Ired. 67.

No counsel for the defendant.

NASH, J. We perceive nothing in the manner in which the jury was formed, or in the charge of the presiding Judge, to induce us to disturb the verdict in this case. The error alleged as to the former consists, as we are told, in the fact, that, after failing to procure the jury from the original pannel, the Court directed the names of thirty-six of the tales jurors to be put into the box, instead of ordering the whole to be deposited together, as it was the right of the prisoner to have an opportunity

of having all the tales tendered to him. If it be true, that, upon the failure to procure a jury from the original *venire*, the prisoner had a right to have tendered to him the whole of the special *venire*, and that upon his demand it would have been erroneous to refuse it, (a point we do not decide,) yet here there has been no error, because he did not demand it, and he was not in fact deprived of any right belonging to him. The jury was not formed out of the thirty-six names first deposited in the box, but, after that pannel was exhausted, the names of all the remainder of the tales jurors were deposited and drawn from. So that in fact, he had an opportunity of having all the jurors tendered to him, and it was precisely the same as if the names of all the jurors had been put into the box at the same time. *State* v. *Lytle*, 5 Ired. 61.

The presiding Judge was fully sustained in his charge, as to the evidence of the mother of the prisoner by the case of *Ellington*, 7th Ired. 61. The charge in the latter case, was, in principle, what it is here, and the reasons are there so fully stated, that it is sufficient to refer to it.

We have looked carefully into the record, and are unable to perceive in it any reason for which the judgment should be arrested.

The opinion will be certified to the Superior Court of Montgomery County.

PER CURIAM. Ordered to be certified accordingly.

WILLIAM J. STEVENS' HEIRS *vs.* JAMES M. SMITH.

Where a tenant for a year was ejected by force of the statute in relation to forcible entry and detainer, whatever the errors and unlawfulness of the proceedings against such tenant may be, the landlords, not being parties to the proceedings, have no right to intervene by writ of certiorari.

Appeal from the Superior Court of Law of Sampson County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

The plaintiffs obtained a certiorari, which the defendant moved to quash, because it was improvidently issued. The Court allowed the motion, and the plaintiffs appealed. Upon the affidavits and record the case is this. The plaintiffs were, for several years, in possession of a tract of land, claiming it in fee, and as descended from their father; and they leased it to Charles Turnage for the year 1845, and he took possession under his lease. On the 27th of January, 1845, the defendant, Smith, before a Justice of the Peace, instituted proceedings against Turnage, under the statute for a forcible entry and detainer; and such proceedings were had thereon, that on the 8th of February following, Turnage was found guilty, and the magistrate ousted him, and put Smith into possession. Immediately afterwards Turnage accepted a lease of the premises from Smith, for the residue of the year, and entered and held under it. The plaintiffs then applied for the certiorari that was issued in this case.

The Court dismissed the certiorari and the plaintiffs appealed.

No counsel for the plaintiffs.

Strange, for the defendant. The Judge was correct in dismissing these proceedings for want of proper parties. *State* v. *Nations*, 1 Ire. 325. 1 *Archbold's Prac.* 209. 2 *William's Justice*, 554. *Rex* v. *Jones*, 1 Strange 474.

RUFFIN, C. J. It is evident enough on the affidavits, that the proceeding for a forcible entry and detainer in

this case, was a flagrant abuse of that remedy; and it is equally plain that there are gross errors in the proceedings, for which they ought to be reversed. We cannot but regret, that it is not in our power to deal with the case upon its merits. But the Court is obliged to sustain the decision of his Honor, inasmuch as Turnage, who was the party, does not complain, and his original landlords cannot intervene in a criminal proceeding, to which they were not parties.

PER CURIAM. Judgment affirmed.

DEN ON DEMISE OF J. C. B. EHRINGHAUS *vs.* MARMADUKE CARTWRIGHT.

A. devised as follows: "I give to my said son Thomas and my daughter Patsy, who was also born before I married her mother, and is now the wife of Charles Brite, all the remaining part of my land, to be equally divided in fee simple." *Held*, that, notwithstanding this declaration of illegitimacy, it was competent for those, who claimed as heirs of Patsy, to shew that she was born in lawful wedlock, and that this mistaken description in the will was controlled by the other more certain description, which identified her as the devisee intended.

If she were illegitimate, her brother Thomas, who was a bastard, could not inherit from *her* legitimate daughter.

No part of a description is to be arbitrarily rejected, but every part of it is to be respected; and especially when a person can be found answering the whole description. But when there is no such person, and where the will or other instrument describes the party in several distinct particulars, by some of which that person may be entirely known from all others, then a mistake in some other one of those particulars, will not defeat the disposition.

The cases of *Sawyer* v. *Sawyer*, 6 Ired. 407, and *Procter* v. *Pool*, 4 Dev. 370, cited and approved.

Appeal from the Superior Court of Law of Pasquotank County, at the Fall Term, 1847, his Honor Judge DICK presiding.

This was an action of ejectment, in which the following case appeared.

In 1805, Thomas Cartwright, the elder, devised the premises to his son, John Cartwright in fee, who entered and lived thereon until his death. On the 26th of December, 1832, John, the son, executed his will, and therein, amongst other things, he devised as follows: "Secondly, I give to my son Thomas, whom I had by my wife before we were married, and who, unfortunately, is a cripple, four acres of land to be laid off in such manner as to include all the buildings I occupy for my residence; to him and his heirs. Thirdly, I give to my said son Thomas and my daughter Patsy, (who was also born before I married her mother, and is now the wife of Charles Brite) all the remaining part of my land, to be equally divided between them, in fee simple." Shortly afterwards the testator, John, died, and Thomas, the son, and Brite and wife, made partition, and the premises now in controversy were allotted to Mrs. Brite, as her moiety under the will. After entering into possession in severalty, Brite and his wife died, leaving an only child, a daughter, who died an infant, and without issue. After her death, Thomas Cartwright, the younger, claimed the premises as her heir, and the lessor of the plaintiff claims under him. Afterwards, the defendant in this suit, being a brother of the testator, John Cartwright, claimed the premises as the heir of Miss Brite, and took possession; and then this action was brought, and was tried on not guilty.

On the trial, the defendant offered evidence, that, when John Cartwright was married, his wife had but one child, who was the said Thomas, the younger, and was then about four weeks old; and that afterwards they had two other children born in wedlock, namely, Sarah, (who died in infancy, and without issue) and then the said Patsy Brite. To the admissibility of the evidence the counsel for the plaintiff objected; but the Court received it, and

instructed the jury, that, if they believed it, Thomas Cartwright, the younger, was not the heir of Patsy Brite's child, and the plaintiff ought not to recover. There was a verdict for the defendant, and judgment; and the plaintiff appealed.

No counsel for the plaintiff.

A Moore, for the defendant.

RUFFIN, C. J. In no aspect of the case, is the plaintiff entitled: whether Mrs. Brite was legitimate, or illegitimate, or whether she took under the will, or by descent from her father, or did not take at all. If she was illegitimate, as the plaintiff contends, then her brother Thomas, who is admitted to be a bastard, cannot inherit from Mrs. Brite's legitimate daughter, according to the construction given to the 10th rule of descents, by the majority of the Court in *Sawyer* v. *Sawyer*, 6 Ired. 407. But, if that were otherwise, the Court is clearly of opinion, that the plaintiff cannot recover, because it was competent for the defendant to shew by witnesses, that Mrs. Brite was born in wedlock, so that, for that reason, her illegitimate brother Thomas, could not be her heir, or her daughter's. For, the statement in the will, that the daughter Patsy was born before the testator married her mother is but a mistake in a part of the description of a devisee, who is otherwise sufficiently described and fully identified; and such a mistake does not defeat the gift. Indeed, upon this point, the plaintiff is in a dilemma, and must fail, whether the illegitimacy of Mrs. Brite be, or be not, an essential part of her description. The will does not prove that she was illegitimate. It only describes her to be so. One, who claims to be a devisee, must by evidence *aliunde*, be brought within the description. If that be a material part of this description, then, to entitle Mrs. Brite under the will, the burden was on the plaintiff to bring her

within the description, by shewing that she was born before the marriage of her parents, just as much as he was obliged to shew that this person was the daughter of the testator's wife, was named Patsy, and was the wife of Charles Brite. Here, that was not and could not be done; but, on the contrary, it was established to the satisfaction of the jury, that she was born, not before, but some years after, the marriage of the testator and her mother. Thus, Mrs. Brite did not answer that part of the description; and, if it were indispensable, that the devisee should come up to every part of the description literally, she could not take under this will, nor her brother Thomas derive title through her. If Patsy did not take under the will, then the testator died intestate, as to that moiety of the land; and in that event, the son Thomas did not succeed to it, as the heir of the testator, by reason of the illegitimacy of the son.

But, the Court holds, clearly, that Mrs. Brite did take under her father's will, being sufficiently identified as the person meant. It is true, that no part of a description is to be arbitrarily rejected, but every part of it is to be respected; and especially when a person can be found, answering the whole description. But when there is no such person, and where the will, or other instrument, describes the party in several distinct particulars, by some of which that person may be certainly known from all others, then a mistake in some other one of those particulars will not defeat the disposition. *Falsa demonstratio non nocet*, is an ancient maxim applicable to such cases, provided there be enough to make the person certain before that was added, and to leave the person certain after rejecting the mistaken reference. That is the established rule of construction, in respect either of the designation of persons, or the description of things; and extrinsic evidence is necessarily resorted to in order to apply the designation or description to the persons claiming, or the things claimed. Many of the rules respecting bounda-

ries are examples of preferring one part of the description, turning out to be true, to another part turning out to be untrue. The case of *Proctor* v. *Pool*, 4 Dev. 370, is an instance of the application of the rule to a general description of the thing devised—the Court holding that the effect of the true description was not to be weakened by a further and unnecessary false description. The case of *Standen* v. *Standen*, 2 Ves. Jr. 589, applied it to persons, and is a precedent perfectly apposite to the case in hand. There, the testator gave pecuniary legacies, and a moiety of his real estates, and of the residue of his personalty to "C. M. Standen, and C. E. Standen, *legitimate* son and daughter of Charles Standen." Those persons were in fact illegitimate. Yet it was held, that the wrong description, in calling them legitimate, did not defeat the gifts to them *nominatim;* because their identity was sufficiently established by their names, according to Lord Bacon's rule, that *veritas nominis tollit errorem demonstrationis.* Here, the daughter is *e converso* described as illegitimate, when she was legitimate, and the case falls directly within the principle. That false demonstration cannot hurt; because there is no one to fill it, and because this person is further and sufficiently designated truly as being the daughter of the testator and his wife, and by her name of Patsy and her state as the wife of a man named Charles Brite. Those circumstances concurring make it absolutely certain, what person was intended by the testator, and uphold the devise. The daughter therefore, took under the will, and being legitimate, and her brother illegitimate, he could not inherit from her, nor trace a right to inherit through her.

Per Curiam. Judgment affirmed.

ELLISON G. MANGUM *vs.* WILLIAM J. HAMLET.

An officer, who levies on personal property and leaves it in possession of the defendant in the execution, only loses his lien as against other executions, under which the property is seized and taken in possession.

Therefore, where A. a constable in Orange County levied on personal property and left it in possession of the defendant in the execution, and B. a constable in another county, with the assent of the defendant, but without any legal process in Orange, removed the property to his own county and there sold it under executions issuing in that county; *Held*, that A. was entitled to recover from B. in an action of trover and conversion.

Appeal from the Superior Court of Law of Orange County, at the Spring Term, 1847, his Honor Judge MANLY presiding.

The action was trover for two mares, a colt, and some corn; and was tried on the general issue. Several points were made for the defendant on the trial, on which the presiding Judge gave opinions; but it is only necessary to state one of them, as the counsel here abandoned all the others. As to the point insisted on in this Court, the case is as follows: The plaintiff was a constable in Orange County, and had in his hands several Fi: Fa's: on Justices' judgments against John Boling; and on the 6th day of October, 1842, he levied them "on a cream colored mare and her colt, the defendant's crop of corn, say from 25 to 40 barrels, and crop of fodder." The The plaintiff left those things in Boling's possession on his plantation in Orange. He afterwards received other executions against Boling's property, and on the 3d of November, 1822, he levied them "on a sorrel mare, the defendant's crop of tobacco hanging in the barn, his crop of corn in the field, supposed to be 30 or 40 barrels, and five stacks of fodder;" and these things also the plaintiff did not remove but left them on the place in the possession of Bo-

ling. The plaintiff then gave evidence, that the defendant, as a contrivance between him and Boling to defeat the levies of the plaintiff, and give the defendant the benefit of the property, removed the mares, and colt, and the corn, on the 4th and 5th days of November, 1842, out of Orange to the defendant's residence in Person County, and there had them sold.

On the part of the defendant evidence was given, that on the 3d of November, 1842, he obtained judgments against Boling before a Justice of the Peace in Person, and sued out Fi: Fa's: and that as he carried this property into that County, it was seized under them by a constable of Person, and afterwards duly advertised and sold.

The counsel for the defendant moved the Court to instruct the jury, that by leaving the property in the debtor's possession, the plaintiff abandoned his levies; espepecially on the cream colored mare and colt, or was guilty of a fraud by which he lost his property, in the articles seized by him. But the Court refused to give the instruction; and on the contrary directed the jury, that by coming into Orange, and taking the property there, without process, and with the view of depriving the plaintiff of it, the defendant was guilty of a conversion, which entitled the plaintiff to recover, although Boling might have assented to it, and assisted in its removal out of the County. A verdict was given for the plaintiff; and from the judgment the defendant appealed.

J. H. Bryan, McRae, W. H. Haywood and *E. G. Reade*, for the plaintiff.

Norwood and *Waddell*, for the defendant.

RUFFIN, C. J. The Court thinks the judgment must be affirmed. The instruction is impeached on the authority

of *Roberts* v. *Scales*, 1 Ired. 88. But the defendant does not bring himself within that case, for the reason pointed out by his Honor.

There, each party was a creditor proceeding on process; so that the one who last levied, and took the property into actual possession, shewed rights which might be affected by the fraud or laches of the other officer. But on whom can this plaintiff be charged with a fraud? Certainly, it was not a fraud on Boling to leave him in possession; and so far as the defendant acted under Boling's directions, or by his consent, he must stand in Boling's shoes. If, however, he could get clear of that connexion, he would then be a mere wrong-doer in taking the property in Orange without any legal authority operating in that county; and as he acted with a view of depriving the plaintiff of the property, such taking and the removal of the property was in itself a conversion, which entitled the plaintiff to this action. If the defendant wished to impeach the plaintiff's levy, he should have obtained executions in Orange, which would have authorised him to seize the property. Until he did so, he had no right or authority to intermeddle; and could not in a legal sense be prejudiced by the act of the plaintiff.

PER CURIAM. Judgment affirmed.

EDWIN SMALL *vs.* JOSEPH H. POOL.

In an action of deceit in the sale of a slave, alleging her unsoundness, it is competent for the defendant to give in evidence, as a matter to aid the jury in assessing damages, what the plaintiff gave for the slave and what he afterwards sold her for.

Appeal from the Superior Court of Law of Pasquotank County, at the Fall Term, 1846, his Honor Judge DICK presiding.

The case presents but a single point. The plaintiff claims damages of the defendant, for a fraud in the sale of a slave, named Tamer. In order to show the amount, to which he was entitled, the plaintiff introduced witnesses, who testified that the difference, between such a slave as Tamer was, if she had been sound, and such as she actually was, was one half. So far as is disclosed by the case, this was all the evidence, upon that point, given to the jury. The defendant offered to prove what the plaintiff gave for the negro, in January, and what he sold her for in the succeeding July in Richmond. This evidence was objected to by the plaintiff and rejected by the Court. There was a verdict and judgment for the plaintiff and the defendant appealed.

A. Moore, for the plaintiff.
No counsel for the defendant.

NASH, J. The refusal of the Judge to receive the evidence offered by the defendant is the error of which he complains. We think his Honor erred, and that the testimony ought to have been received. In actions sounding in damages, the jury, in general, have a discretionary power, in awarding them, subject to the control of the Court. But in a case of deceit in the sale of property,

the law has adopted as the rule by which the jury are to be governed, and the damages estimated, the difference in the value of the article sold, as sound or unsound, at the time of the sale. The price given by the purchaser, and that for which he sold it, do not, conclusively, fix the amount of damages. But it is competent as *some* evidence of the value of the property, at the respective times of the purchase and the sale, and as such the jury had a right to have it. *Clare* v. *Maynard*, 32, E. C. L. R. 714. It does not establish the value, but may aid and assist the jury in their enquiries upon the point. More particularly was it admissible in this case, as the plaintiff had furnished the jury with no evidence upon which they could understandingly act.

He did not show what sum Tamer was worth at the time of the sale, either as sound or unsound.

PER CURIAM. Judgment reversed, and a *venire de novo* awarded.

THE STATE *vs.* MARLEY, A SLAVE.

From the judgment of a Justice of the Peace on an offence committed by a slave of which he has original jurisdiction, an appeal by the master lies to the County Court, but not from thence to the Superior Court.

But the master may, as in other decisions by an inferior tribunal, have the case re-examined in the Superior Court, upon a writ of certiorari or writ of error.

Appeal from the Superior Court of Law of New Hanover County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

State v. Marley.

This is a criminal proceeding against a slave. Upon application to a Justice of the Peace, a warrant was issued against the defendant, for insolence to, and an assault and battery upon a white man. He was adjudged guilty, and sentenced to receive five and twenty stripes. From this judgment his master appealed to the Court of Pleas and Quarter Sessions. He was there tried, and being convicted, was sentenced by the Court to receive the same punishment. His master again appealed to the Superior Court, where he was again tried and convicted; and the judgment being arrested by the presiding Judge, the case is brought here upon the appeal of the State.

Attorney General, for the State.
No counsel in this Court for the defendant.

NASH, J. By arresting the judgment, we understand that the proceedings were dismissed, and the defendant discharged.

All the laws existing in this State, previous to 1830, upon the subject of offences committed by slaves, were, at the session of the Legislature, held in that year, thrown into one Act, and re-enacted, *Rev. St. ch.* 111. By that Act, such offences were divided into three classes, and the cognizance of them committed to three separate and distinct tribunals. Those which "were of such a trivial nature, as not to deserve a greater punishment" than whipping, were, by the 41st sec. trusted to a single magistrate; while by the 42d sec. such as were of a higher degree, were committed to the "original and exclusive jurisdiction of the Courts of Pleas and Quarter Sessions;" except in cases, in which the punishment might extend to life, and those within the benefit of clergy. These latter by the 43d sec. are committed to the original and exclusive jurisdiction of the Superior Courts. The policy of the law in this distribution of power is very obvious. The offences entrusted to a Justice of the Peace were of

a nature deemed by the law too trivial to need the attention and occupy the time of a Court of record, and required speedy and cheap action. They were committed by a portion of our population, mingling in all our domestic relations, and whose conduct required a constant supervision, to keep them in a proper state of subordination. The Courts of record met only at stated periods, and at designated points, while the Justices being spread over their respective counties, were prepared to act at any time, were accessible at all times, and in their action were bound to the observance of few forms. As the offences rose in magnitude, they required, in the infliction of punishment, increased care and form in the prosecution. The power, however, was not only divided, but each tribunal under the Act of '36, exercised it without control by appeal; the jurisdiction of each on this subject was original and exclusive. That this was the intention of the Legislature, is manifest from the language used, from the silence of the Act as to any appeal, and from the fact, that no appeal from either to the Court above was, as far as we are apprised, ever attempted until the year 1842. In that year, the previous policy was departed from, and the Legislature, by an Act, ch. 4, authorised an appeal by the master of a slave, convicted by a single Justice of the Peace, to the County Court. The question presented to us, is, has the master of the slave Marley, a right to appeal from the County to the Superior Court. We think he has not. The object of the Legislature, in the enactment of 1836, is so evident, and its policy so consistent with the peace and safety of the community, that we feel no disposition to extend the Act of 1842 further than its words authorise us; because we believe that it was not the intention of the Legislature so to extend it. By the words of that Act, the appeal granted is to the County Court, and nothing is said of any other or further appeal. The jurisdiction of the County Court, in these matters, under the Act of 1836, is

original and *exclusive*, and when, by the Act of 1842, they acquired an appellate jurisdiction, the latter must be exercised by them to the same extent as the former. Unless it is otherwise ordered in the law, it must be exclusive, in the sense of being final; and for the plain reason, that the Legislature, in increasing their jurisdiction, has not altered the exclusive nature of it. If it were not so, this singular anomaly would be presented, that slaves brought before them for the higher offences, would have no right to ask the judgment of a higher tribunal, while the perpetrators of those of the lowest and most trivial character, would be so entitled.

We are of opinion, that, under the Act of 1842, the master of the defendant had no right to appeal from the County to the Superior Court, and that the presiding Judge ought to have dismissed the appeal, as improvidently granted, and remanded the case to the County Court, and bound over the defendant for his appearance there, so as to subject him to the sentence of the County Court.

It will be understood, that this opinion is confined to an appeal from the County Court, by the owner of a slave, as a matter of right; and it is not meant to interfere with the general doctrine, that the proceedings of all inferior tribunals may, upon a proper case, be re-examined in the Superior Courts upon certiorari, or on writ of error.

Per Curiam. This opinion will be certified to the Superior Court of Law of New Hanover County.

LAW LIBRARY OF University of MICHIGAN.

KENNETH B. MURCHISON & AL. vs. JOSEPH WHITE.

Trover will not lie, except for one, who has the immediate right of possession at the time of the conversion.

It is not sufficient to support this action, that an unwarrantable injury has been done to his right of property. The right of property and the right of immediate possession must both concur.

For such an injury, the plaintiff may recover in another form of action.

Thus where A. claimed under a mortgage of personal property, executed the 19th of January, 1843, but not registered until the 2nd Monday of the next April, and B. a sheriff, in March, 1843, levied an attachment on the property, and sold it without any order in the cause; *Held*, that, though B's. act in selling may have been without authority of law, yet A. being entitled only from the registration of his mortgage, could not maintain an action of trover against B.

The cases of *Alexander* v. *Springs*, 5 Ired. 475, *Popelston* v *Skinner*, 4 Dev. & Bat. 156, and *Andrews* v. *Shaw*, 4 Dev. 70, cited and approved.

Appeal from the Superior Court of Law of Person County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

The action is trover for sundry chattels,, and the plea, not guilty. The articles had belonged to John Douglass and the plaintiffs claim title under an instrument, which they alleged to be a mortgage to secure the payment of $300. It was executed on the 19th of January, 1843, and registered on the 2nd Monday of April following. The goods were the tools and stock of timber and carriages of Douglass, who was a coach-maker, and retained the possession until he absconded in March 1843; at which time one Plunket sued out against him an original attachment from Anson County Court, which the defendant, as sheriff, levied on a house and lot in Wadesborough, and on the goods which are the subject of this action. In June, 1843, the defendant sold the goods levied on; and in July, judgment was rendered for Plunket for $82, and the costs,

and he took out a *venditioni exponas*, against the house and lot only; and under it the defendant sold them in October following, for a price which satisfied the execution.

This suit was commenced on the 14th of March, 1845. On the trial the counsel for the defendant insisted, amongst other things, that this action would not lie. But the Court held, that it would, and a verdict and judgment were given for the plaintiff, and the defendant appealed.

Strange, for the plaintiff.

Trover will lie. 1 *Archbold's N. P.* 451. 457 *Brancourt* v. *Bridges & others*, 1 B. & C. 145. *Agar* v. *Lisle*, Brownly's Rep. 5. *Murray & others* v. *Burling*, 10 John. Rep. 172. Com. Dig. title action on case Trover Letter A. 6 *Carpenter's case*, 1 Smith's leading cases, 62. *Dye* v. *Leatherdale*, 3 Wils. 40. *Wilder* v. *Spier & others*, 8 Adol. & Ellis, 547.

Winston, for the defendant.

Ruffin, C. J. It is unnecessary to consider any other point made for the defendant, but that relative to the action; as the opinion of the Court is with him on that. The seizure by the sheriff in March was rightful, as the mortgage was not registered until about the middle of April, and, by the statute, it enured only from its registration, and without any relation back. There is no doubt, however, that, notwithstanding the sheriff's special property and possession, the conveyance to the plaintiffs was effectual to pass the property to them from the period of its registration, subject only to that special property for the purpose of satisfying the attaching creditor. *Payne* v. *Drew*, 4 East. 523. *Alexander* v. *Springs*, 5 Ire. 475. And, if any of these articles had remained in the sheriff's hands after satisfying the execution, he could have been sued in trover for them, if he refused to deliver them up; as might any one else, in whose hands,

the property is, or who has converted it since the attachment debt was paid. *Popleston* v. *Skinner*, 4 Dev. & Bat. 156. But the defendant has not any part of the effects; having sold them in June 1843, while the attachment was still pending. That was a wrongful sale, as it was made without an order in the cause; and unquestionably the plaintiffs have a remedy for the injury to their right of property. But the question is, whether they can maintain this particular action of trover, when the sale and conversion by the defendant were at a time, when the attachment formed a valid lien, and entitled the sheriff to the possession of the goods, and excluded the plaintiffs from the right of present possession? We think not. The gist of the action is the conversion, and that must have been constituted, if at all, by the sale of the goods in June; for they never came to the defendant's hands afterwards. It is laid down both in the most approved text books, and in adjudications, that, in order to support trover, the plaintiff must, at the time of the conversion, have the right to immediate possession. Mr. Chitty states that to be the rule in his Practice on Pleading, 1 *vol.* 174; and he refers to *Gordon* v. *Harper*, 7 T. R. 9, in which it was so held, because the declaration alleges that the plaintiff "was lawfully possessed." In *Pain* v. *Whitaker*, R. & M. 99, Chief Justice Abbott lays down the principle to be, that the plaintiff must have the right of possession of the goods, at the time they are taken, which there meant, converted; and he gives the same reason for it, namely, that, if he has not, the allegation, "that he was lawfully possessed," will not be supported by the evidence. It is true, that in *Gordon* v. *Harper*, the action was brought before the expiration of the term, for which the plaintiff had hired out the furniture; and, therefore, that was not a direct decision that the general owner might not have trover, after the term of hiring ended. In *Andrews* v. *Shaw*, 4 Dev. 70, that point was expressly left open. But it was, because it is a habit of caution in the

Court not to go out of the case before us, and lay down a broader rule than is necessary for its determination; and not on account of any doubt about it. It is no where found to have been said, either in the books or from the bench, that trover may or may not be sustained, according to the period at which the action is brought. That is not the criterion. On the contrary, the rule, as already quoted, gives the action to one entitled to the present possession when the conversion took place, and refuses it, (at any time) to one who is not entitled to such possession. Indeed, it is nearly certain, that in *Pain* v. *Whitaker*, the suit was brought, after the month ended for which the Piano Forte was let. And in delivering the judgment of the Court in *Bloxam* v. *Sanders*, 4 Barn & Ald. 941, Mr. Justice Bayley, after stating that the property vested in the buyer of goods by the contract, but that he was not entitled to the possession 'till the payment of the price, laid it down, that for that reason the plaintiffs could not maintain trover for the conversion by the defendants in re-selling the crops without the assent of the buyer or the rescinding of the contract. He said, that the buyer might act upon his right of property, if any thing unwarrantable is done to that right: as, for instance, if the vendor re-sell when he ought not, the buyer may bring a special action for the injury sustained by such wrongful sale, and recover damages to the extent of such injury; but he can maintain no action, in which right of property and right of possession are both requisite, and trover is an action of that description. In the case before us, it has turned out that the injury to the plaintiffs' right of property, by the unauthorised sale of the defendant, was to the full value of the goods; yet, as the conversion by that sale was committed before the plaintiffs were entitled to the possession, they cannot have this remedy.

Per Curiam. Judgment reversed, and *venire de novo*.

MICHAEL T. HALL *vs* MALACHI B. ROBINSON.

The Act of 1807, giving a right to one surety to recover at law his rateable proportion of the debt of the principal, does not enlarge the rights of the surety, who pays the debt, nor deprive the co-surety of any just grounds of defence, which would before have been available to him in equity.

The only exception is, that, from the necessity of the case, the Court of law cannot take cognizance of the complicated case of one or more of the sureties at law, when they exceed two, but that it restricts the recovery to an aliquot part of the debt, according to the number of sureties.

When two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it enures to the benefit of all.

Where A. a surety for B. received from B. his (A's. debt) and A. was to pay to B. a debt to which A. was surety, and afterwards it being discovered that A. was surety for other debts of B. and it was then agreed that A. should pay those other debts as well as the first, *pro rata* in proportion to the debt he had owed B.; and C. being a co-surety with A. in the first debt also received a certain sum from B. in discharge from his liabilitity, and A. had to discharge the whole of the first debt, *held* that A. was entitled to recover from C. the sum so received by him from B.

The cases of *Powell* v. *Matthis*, 4 Ire. 83, *Moore* v. *Moore*, 4 Dev. 388, *Gregory* v. *Murrill*, 2 Ire. Eq. 233, *Kerns* v. *Chambers*, 3 Ire. Eq. 577, *Cooper* v. *Wilcox*, 2 Dev. and Bat. 90, *Nelson* v. *Williams*, Id. 118, *Smith* v. *McLeod*, 3 Ire. Eq. 390, and *Fagan* v. *Jacocks*, 4 Dev. 263 cited and approved.

Appeal from the Superior Court of Law of Carteret County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

This is an action of assumpsit and was tried on the general issue. The case appeared to be as follows.

The plaintiff and defendant were co-sureties for Jesse W. Lee in a promissory note to Peter Pelletier for $497 25. The plaintiff was indebted to Lee on a note $492 30, payable March 20th, 1840. After those notes had fallen due, it was ascertained that Lee was unable to pay all his debts, and was insolvent; and it was agreed between him and Hall, that the former should surrender to the

latter his note for $492 30, and that he, Hall, should pay the amount due on it in discharge of the debt to Pelletier, and Lee immediately delivered to Hall his note.

At that time Hall was also the surety for Lee for a debt of $114 05 to Moore & Jackson, and a co-surety, with three other persons in a note of $1000, held by one of the Banks; and, shortly after, having received his note from Lee, the plaintiff ascertained that these latter debts were subsisting, and that he would be liable on them; and in consequence thereof he came to a new agreement with Lee on the 15th of September, 1840, that the sum due on Hall's note should be applied, *pro rata*, to the debt to Pelletier and the other debts for which the plaintiff was a surety as aforesaid. On the 16th of September 1840, Robinson, the defendant, received effects from Lee to the value of $128 20, and gave Lee his engagement to pay that sum on the debt to Pelletier. Afterwards Hall was compelled by execution to pay Pelletier his whole debt, principal, interest, and costs; and then he brought this suit for contribution.

The Court instructed the jury, that after deducting a *pro rata* share of Hall's debts to Lee, the plaintiff was entitled to recover one half of the residue of the sum paid to Pelletier, and also one half of the sum of $128 20, which the defendant had promised to pay on that debt. The jury found, accordingly, for the plaintiff, and assessed the damages to 238 97; and from the judgment the defendant appealed.

J. H. Bryan, for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. The Court is of opinion, that the jury was not properly instructed. It seems clear that the plaintiff was entitled to recover the whole of the sum received from Lee by the defendant. It is a fund provided by the principal for the payment of his debt, which

the defendant undertook to pay on it, and did not, but left the plaintiff to pay the whole debt. It is true the plaintiff had before received from the principal a sum nearly, if not quite, sufficient to discharge the debt, and that he received it for that purpose; and it was insisted for the defendant, that, as between the plaintiff and him, the debt was to be considered as paid from the time the plaintiff received that fund, and, therefore, that the plaintiff could not recover any thing, unless it might be one half of the excess, if any, of the amount due on the note to Pelletier over that due on the note of Hall to Lee. Although that might have been the result, had the case stood on the first transaction between Lee and Hall, yet it cannot be admitted, when that and the subsequent transactions are considered together. For, though it may be true, that Lee and Hall, after appropriating the money in Hall's hands, to the debt to Pelletier, could not change its destination, to the prejudice of the defendant, yet before it was paid to Pelletier, it was certainly competent to them to deal with it as suited themselves, as far as such dealing did not affect the interest of third persons. Now, the agreement to divert to other purposes a part of the fund held by Hall could not prejudice the defendant, if its place was supplied by the deposit of an equal fund in his own hands. To the extent of the sum received by the defendant, the agreement for applying a part of the debt of Hall to the satisfaction of other debts for which he was bound, was rendered a just and proper agreement, and the plaintiff did, and could do, no wrong to the defendant in so applying that part. That left in his hands, applicable to Pelletier's debt, $128 20, less than he paid on it, and he might have his action against Lee therefor; and as the plaintiff cannot effectually recover against him, this action lies against the defendant, who received that sum for this debt, and cannot in conscience, and ought not in law, to keep it.

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But the Court is further of opinion, that the recovery was right in respect only of that sum of $128 20, and beyond that is erroneous.

Before the Act of 1807, the remedy between co-sureties was in equity only. That act does not enlarge the rights of the surety who pays the debt, nor deprive the co-surety of any just grounds of defence, which would before have been available to him. It was intended merely to change the jurisdiction, or, rather, to enlarge that of the Courts of law: not upon any arbitrary principle, but, for the amendment of the law, giving a less expensive and more expeditious remedy by action, in addition to that given in equity. As far as the jurisdiction is concurrent, the right of recovery and of defence should be the same in both Courts. It has been held, indeed, that, from the necessity arising out of the imperfection of the jurisdiction of a Court of law, the Act cannot be extended to the complicated case of the insolvency of one or more of the sureties, when they exceed two, but that it restricts the recovery to an aliquot part of the debt, according to the number of the sureties, *Powell* v. *Matthis*, 4 Ired. 83. It does not, then, carry the legal to the extent of the equitable remedy, in some cases. But, in no case was it meant to carry it further, so as to make one surety responsible to another in an action at law, when there would not be a decree against him in equity. Indeed, the Act expressly adopts one of the most important principles if equity respecting the recourse of one surety on another; which is, that it shall not be had unless the principal be insolvent; and by providing, that the plaintiff may recover a just and rateable proportion of the sum paid by him, leaves it to the Courts, under the particular circumstances, to determine, what that is, upon the principles of right and justice. Of course, the construction must be, that the Act had reference to those known principles, which had before been applied between parties standing in this relation; and the action is therefore to be treated as an

equitable one, in which nothing can be recovered but what *ex æquo et bono*, the defendant ought to pay, as far as his defences are, in their nature, examinable in a Court of law.

Having arrived at the foregoing conclusion, it is not difficult to adjust the right and liabilities of these parties. The relief between co-sureties in equity proceeds upon the maxim, that equality is equity; and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it, that when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemity or counter-security to any extent, it enures to the benefit of all. The risk and the relief ought to be co-extensive. *Moore* v. *Moore*, 4 Dev. 358. *Gregory* v. *Murrell*, 2 Ired. Eq. 233. To the extent of the fund in Hall's hands, and applicable to it, the debt to Pelletier is to be considered as discharged, as between these parties, and the plaintiff with that sum in his hands, ought not to raise the money from the defendant. *Kerns* v. *Chambers*, 3 Ired. Eq. 577. If, therefore, there had been only the first agreement between Hall and Lee, it is clear the plaintiff could not recover in respect of as much of the money paid by him, as his own debt covered. It is next to be considered whether the second agreement between those persons altered the rights of the present parties, as between themselves. The opinion has been already given, that the defendant by receiving effects from Lee rendered himself liable, *pro tanto*, for the debt to Pelletier, and to an equal extent put it in the power of Lee and Hall to appropriate the fund held by Hall to other purposes. But the agreement between Lee and Hall could not *per se* have that effect, nor bind the present defendant farther than, by his own consent or act, he should bind himself. As far as it affected their own interest, Hall and Lee were competent to make the arrangement they did. But they were not competent to make it, as far as it affected

the defendant, without his concurrence. It is to be recollected, that the indemnity, as soon as it was obtained, enured to the benefit of both sureties. It was precisely the same as if it had been expressly declared to be for their joint benefit. If it had been so declared, no one would argue, that one of them could deal with it to his own advantage, and to the prejudice of the other, without consulting him. It was held in *Kerns* v. *Chambers*, that the co-surety had the right to be consulted, and that the other, by holding up the security unreasonably, and for his own purposes, without the assent of the former, made the security his own, and could not proceed to sell the co-surety's property. The surety, who gets a counter-security into his hands, is, in respect to a remedy against a co surety, exactly on a footing with a creditor, who gets an additional security, in respect of his remedy against a surety for the debt. The same reasoning applies equally to both. Giving a collateral security upon the property of the principal, devotes that property to the payment of the debt, and the surety has an interest in it immediately, as well as the creditor; and it follows, that the creditor cannot wilfully discharge it, or deprive a surety of the benefit of it, even for the purpose of letting in another debt of his own. *Cooper* v. *Wilcox*, 2 Dev. and Bat. 90. *Nelson* v. *Williams*, Id. 118. *Smith* v. *McLeod*, 3 Ired. Eq. In like manner one surety, who gets an indemnity, is a trustee for a co-surety, and cannot deal with the fund to his prejudice without his consent. These cases are like all others, in which one man undertakes to dispose of the property of another. He cannot do it without the owner's authority. Upon these equitable principles, it is clear, the plaintiff ought not to recover more than the defendant is liable for in respect of the sum received by him from Lee.

Those equitable principles have been already incorporated into the law of this case by an adjudication in an action founded on the statute. *Fagan* v. *Jacocks*, 4 Dev.

263. The principal, there, made an assignment of effects in trust to indemnify the plaintiff, and upwards of half the debt was discharged by the proceeds of those effects; and then the plaintiff, having been compelled to pay a part of the residue of the debt, brought his action against his co-surety, to recover back what he had paid, although the defendant had paid more of the residue than the plaintiff had. It was held, on these grounds, that the plaintiff could not recover; because the sum raised out of the effects assigned was not, within the meaning of the law, paid by the plaintiff, but by the debtor himself, and discharged the debt, *pro tanto*, in exoneration of all the sureties. Indeed, when one attentively considers the act, it is apparent upon its own terms, without invoking the doctrine of equity, that each of these sureties is entitled to the benefit of the fund in the hands of the other, as far as it is necessary to his indemnity. For, how can this plaintiff allege that Lee was insolvent, and for that reason that he was obliged to pay this money, and cannot recover it back, when, in fact he has securities belonging to the principal to the value of the debt. When the act speaks of the insolvency of the principal, which creates the right of contribution between his sureties, it does not mean a general insolvency, whereby the principal may be unable to pay all his debts; for that does not concern the sureties for a particular debt, provided the principal pays or secures that debt. As far as he pays or secures the debt for which they are bound, he cannot be called insolvent within the sense of the Legislature, so as to give one of the sureties an action against the other. But, here, the case is simpler, than if the principal had provided collateral securities for the indemnity of his sureties. It is as simple as it can be: being a case, in which money was put into the hands of one, and effects of a certain value sold to the other, and engagements given by them to pay those several amounts on the debt, for which they were bound. To those amounts the plain-

tiff, and the defendant respectively, thereby became the real debtors, as between themselves, and therefore, *pro tanto*, the one ought not to recover from the other.

PER CURIAM. Judgment reversed, and *venire de novo*.

JAMES W. HARDING *vs.* HENRY SPIVEY.

A *fieri facias* binds property from its *teste* and this lien is continued if regular *alias* writs of *fi. fa.* are issued.

Therefore where a *fieri facias* issued against one who was a joint owner of slaves with others, and afterwards, upon the petition of all the joint owners, the slaves were directed by a Court of competent jurisdiction to be sold for a division and under that order were sold, the lien of the sheriff, acting under the original and *alias fi. fa's.* was not divested, but he had a right still to sell the undivided interest of the defendant in his executions.

It never was meant, by the Acts of our Legislature, in directing the mode of proceeding for the partition of slaves, to interfere with the just rights of persons, not parties to the proceeding for partition, whether arising upon a claim of property by adverse title, or upon the lien of a creditor's execution.

The cases of *Brassfield* v. *Whitaker*, 4 Hawks. 309, *Arrington* v. *Sledge*, 2 Dev. 359, *Yarborough* v. *State Bank*, 2 Dev. 23, *Stamps* v. *Irvine*, 2 Hawks. 232, *Finley* v. *Lea*, 4 Dev. & Bat. 169, *Green* v. *Johnson*, 2 Hawks. 309, *Palmer* v. *Clark*, 2 Dev. 354, *Ricks* v. *Blount*, 4 Dev. 128, *Finley* v. *Smith*, 2 Ire. 225, *Smith* v. *Brittain*, 3 Ire. Eq. 347, *Ex parte Harding*, 3 Ire. 320, and *Latham* v. *Wiswall*, 2 Ire. Eq. 294, cited and approved.

Appeal from the Superior Court of Law of Northampton County at the Fall Term, 1847, his Honor Judge BATTLE presiding.

The action is trespass for taking and selling four negro slaves; and the defendant justified, as the Sheriff of Northampton County, under the execution hereinafter mentioned. On the trial the case was agreed to be as follows:

The plaintiff, one Archelaus Tisdale, and other persons were tenants in common of the slaves; and at the County Court of Northampton, held on the first Monday of March, 1842, they filed their petition for partition, and to that end for a sale of the slaves; and the sale was decreed accordingly, and the present plaintiff appointed the Commissioner to make it. On the second of April next following, the slaves were sold by the plaintiff and bid off by one William Harding, at the request and as the agent of the plaintiff; and on the 15th of April, William Harding made a conveyance of them to the plaintiff. At the next term of the Court, held the first Monday of June, the plaintiff reported the sale to William Harding. On the 3d Monday of March, 1842, George Cooper obtained a judgment in the Superior Court of Nash County, against Archelaus Tisdale, and issued thereon a *fieri facias*, tested of that day and directed to the Sheriff of Northampton, which was, on the 17th of April, 1842, delivered to the defendant, then the Sheriff, and was returned *nulla bona*. *Alias* and *pluries* writs of *Fi. Fa.* regularly issued from term to term on the judgment, on all of which the sheriff returned *nulla bona*, until the last, and on it he seized the negroes in question, and sold the share of said Tisdale therein—the plaintiff forbidding him to do so, and claiming the negroes as his.

At June term, 1842, of the County Court, George Cooper applied to have the bonds for the purchase money deposited in Court, and for a order that the debt to him, due on his judgment, and the execution then in the sheriff's hands, should be satisfied out of Tisdale's share of the bonds, when collected. At the same term, the present plaintiff opposed the motion and claimed that

share of the bonds under a purchase and assignment from Tisdale. At September term following, the sale was confirmed without objection; and at September term 1843, the County Court (after a decision upon appeal by the Supreme Court) ordered the money to be paid to the several tenants in common, and the share of Tisdale to the present plaintiff. After that, the sheriff made the sale, for which this action is brought.

The parties agreed, that, if upon this case, the Court should be of opinion for the plaintiff, judgment should be entered for $190 35; and, if otherwise, then a nonsuit should be entered. The presiding Judge held, that the plaintiff was entitled to recover, and he had judgment accordingly; and the defendant appealed.

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No counsel for the plaintiff.

B. F. Moore, for the defendant.

RUFFIN, C. J. The case turns upon the operation of the original *fieri facias*. For, if that created a lien on this property, it was preserved by the alias writs, which regularly issued, and related to the teste of the first writ. *Brassfield* v. *Whitaker*, 4 Hawks. 309. *Arrington* v. *Sledge*, 2 Dev. 359. This is so even against another execution. *Yarborough* v. *State Bank*, 2 Dev. 23. That a *fieri facias* binds the property of the debtor, so as to avoid any alienation by him, after the teste, is, as a general rule, so undoubtedly true, as to need no authority to support it. The cases, however, of *Stamps* v. *Irwine*, 2 Hawks, 232, and *Finley* v. *Lea*, 4 Dev. & Bat. 169, may be mentioned, in which the point was directly decided in ejectment and trover; and there are many other cases both here, and in England, at common law. It lies then on the plaintiff to shew an exception to the rule which will cover this case. No direct decision has been adduced to support such an exception; nor, as it seems to us, any reasons offered, on which it can be established.

The most plausible mode of putting the argument is, that both sales, that under the decree for partition, and that under the execution, are judicial sales; and therefore that the former, having been first ordered and first made, must be held effectual. It is true that in some instances of sales under the process of the law, that, which is first made, will, for that reason, be upheld. For example, if property be taken under one *fieri facias*, and then another of prior teste come to the sheriff's hands, it is his duty to sell, and apply the money to that of the elder teste; yet, if there had been a sale, under the execution of the younger teste, before the other was delivered, the sale would be good and the money applicable to the writ on which it was raised. Nay, if the creditor in an execution of older teste deliver it to the sheriff, but by directions to him prevents it from being acted on, it will not hinder the sheriff from proceeding to sell the debtor's property under a junior execution, and applying the proceeds to it. *Green* v. *Johnson*, 2 Hawks. 309. *Palmer* v. *Clark*, 2 Dev. 354. In those cases, however, it is to be remarked, that there are the meritorious claims of creditors on both sides. If one of them will not sue out his execution, or will not sell on it, another ought not to be hindered from doing so, but he shall be at liberty to sell, and a purchaser under his execution is armed with the rights of the creditor and gains a title, which the other creditor cannot defeat by his execution of older teste. The reason of that is, that the law will not allow its process of execution to be obstructed, even by a like process, on which the party will not act; and therefore it holds it to be a fraud in a creditor, who is entitled to a preferable execution, if he uses it to protect the debtor's property from other executions, instead of raising his own debt, by a sale, and leaving the residue of the property accessible to others. *Palmer* v. *Clark*. *Ricks* v. *Blount*, 4 Dev. 128. But this reasoning has no application to an alienation by the debtor himself: for that, on the other

hand, is considered a fraud by the debtor, as tending to defeat the process of the law for the recovery of judgment debts; and the purchaser is regarded in like manner, because, from necessity, the rule, as to him, is *caveat emptor*. *Finley* v. *Smith*, 2 Ired. 225. That may work a hardship in cases of actual innocence in the purchaser. Hence, the law was altered in England by the statute of frauds. But, it may be remarked, that even changes only the period, to which the lien relates, from the teste to the delivery of the writ—still creating a lien before the seizure of the property, and therefore, still applying the maxim *caveat emptor*. But we have no such statute, and the common law is still in force. Then, the enquiry is, whether a sale of this kind, though made under the authority of a decree, is, in respect of an execution, to be treated as if it were a sale under execution, or is to be regarded as an alienation by the party. It seems to the Court, that it cannot be likened to the sales under execution, of which we have been speaking; but that it partakes essentially of the latter character. There is, by the decree, no recovery of the property by one person from another, nor is there a sale for the benefit of a creditor; whereby the property, or its value is taken in *invito*. But the whole proceeding is at the instance of the owner, and for his benefit in effecting partition. It is in reality, but a mode of sale, by the owner himself. *Smith* v. *Brittain*, 3 Ired. Eq. 347. If the owners be all of age, they can sell of themselves; and such a sale, though for the purpose of division, would not impair the lien of a *fieri facias*. The Act, *Rev. St. ch.* 85, *sec.* 18, 19, was only intended to meet the inconveniences of the disability or obstinacy of some of the tenants, and facilitate the conveyance to a purchaser. It was never meant to interfere with the first rights of persons, not parties to the proceeding for partition, whether arising upon a claim of property by adverse title, or upon the lien of a creditor's execution. For the decree for the sale, does not profess

in itself, to divest the title, out of the parties, but simply to order the sale of the thing, as their property. Nor does it profess to guarantee the title; but, in the words of the Act, the sale is only to pass "such title, interest, and estate in the negro or chattel sold, as the joint tenants, or tenants in common had," and, of course, under the liens or incumbrances, and in the plight in which they had it. It would be very mischievous, if an owner of property, belonging to more than one, should be declared able to exempt his share, from execution and immediate sale, by exhibiting a petition for partition, and procuring a decree for a sale, for that purpose. It would open a wide door for frauds on executions. On the other hand, but little hardship is imposed on the purchaser, by treating this as the party's own alienation, in law, as it substantially is, in point of fact. The contract is not conclusive until it be reported and confirmed by the Court, for the want of an objection, or of a sufficient objection to it. This gives the purchaser, in almost every instance, the certain opportunity of knowing before the sale is finally closed, whether there is an execution, of a teste that would overreach his purchase; and if there be, he may have the contract rescinded. This plaintiff, indeed, had knowledge of the execution, and acted with his eyes open. But the opinion does not depend on that circumstance, but solely on the lien of the *fieri facias*. As the plaintiff's knowledge of the execution did not add to its force against him, so, on the other hand, the confirmation of the sale, with the knowledge, and without the opposition of Cooper, did not impair the efficacy of his writ. The Court has already decided, *ex parte Harding*, 3 Ired. 320, that Cooper could not intervene in that proceeding; and therefore, he could not object to the confirmation. Moreover, if that were otherwise, the sheriff might still insist on the justification to himself, by virtue of the writs in his hands.

It is also, perhaps, proper to advert to the case of a decree for the sale of a lunatic estate; which it was held

in *Latham* v. *Wiswall*, 2 Ired. Eq. 294, would prevent a creditor from taking the property under an execution of a teste, subsequent to the date of the decree. It may be observed first, that there is a distinction between that case, and the present, in this: that there, it was found necessary to restrain the creditor by injunction, which implies that he had the right at law, to proceed on his execution. But, the material difference is, that the jurisdiction of the Court of Equity is peculiar over the property of idiots and lunatics, and that it is the duty of the Court to dispose of it, or sell it as may be deemed the most advantageous for the support of the owner and his family, and the payment of his debts. The decree for sale, is therefore, in effect a proceeding *in rem* for the benefit of creditors, as well as of the helpless debtor; and for both reasons the Chancellor is bound to sustain his decree, and the proceedings under it, against an attempt to render them ineffectual, and frustrate the administering of the effects under the directions of the Court.

Per Curiam. Judgment reversed, and judgment of non-suit, according to the agreement.

DEN ON DEMISE OF WILLIE JONES & AL. *vs.* GUILFORD LEWIS.

A Court of record has a discretionary right to amend its records, at any time, *nunc pro tunc*, and it is the duty of the clerk, not simply to enter such order of amendment, but *actually to make the amendment*, as directed by the Court.

The law points out no specific mode, in which a sheriff shall conduct his sales on executions, but he is bound by general principles to sell the property levied on in such a way, as will probably raise the most money.

Where a sheriff had an execution against two persons, each owning an undivided fifth part of a tract of land, and he sold both their interests at one bid, *Held*, that this sale was not void in law, but, if objected to, should have been left to a jury to determine, as a matter of fact, whether the sale was properly conducted or not.

Where a deed from a husband and wife for the real estate of the wife, had on it only the following certificate from the Clerk of the County Court, as to its execution, to-wit: "The private examination of H. J. wife of J. C. J. taken by Charles A. Hill, a member of the Court, which being satisfactory, it is ordered to be recorded," and signed "C. A. Hill, J. P." and a proof of the execution of the deed by the subscribing witness and an order of registration; *Held* that the interest of the wife in the lands did not pass.

The cases of the *State* v. *King*, 5 Ired. 203, *Galloway* v. *McKeethen* 5 Ired. 12, *Wilson* v. *Twitty*, 3 Hawks 44, *Thompson* v. *Hodges*, 3 Hawks 51, *Davis* v. *Abbot*, 3 Ired. 139, *Burgess* v. *Wilson*, 2 Dev. 306, and *Lucas* v. *Cobb*, Dev. and Bat. 228, cited and approved.

Appeal from the Superior Court of Law of Franklin County, at the Fall Term, 1847, his Honor Judge BATTLE presiding.

The plaintiff's case, as alleged, is as follows. Hixie Jones died in the year, 1823, seized and possessed, of the premises in dispute, leaving five children, to-wit: Willie Jones, Lydia Witcher, Eliza Jones, John C. Jones, and Atlas Jones. He claims three undivided fifth parts, as lessee of the three first named children, and two undivided fifth parts, as lessee of Jesse Person. To show and make out the title of Jesse Person, the plaintiff gave in

evidence the transcripts of several judgments in the County Court of Franklin, at the instance of several persons against John C. Jones; and the transcripts of several judgments, in favour of several plaintiffs against Atlas Jones. All of these judgments were rendered on attachments, but one against John C. Jones. Executions issued and were, by the sheriff, levied on the undivided interests of John C. and Atlas Jones, in the premises, which consisted of several tracts. The land was sold under all the executions, and, at the sale, each tract was set up separately, and the interest of the defendant sold in it at one bid. Jesse Person was the purchaser, and to him the sheriff executed a deed.

The judgments upon all the attachments were taken by default, and, in all, but two against John C. Jones, and one against Atlas, the attachments pointed out no time or place for the appearance of the defendants. And after the institution of this suit, the County Court amended the attachments, so as to make them regular. The defendant also claimed title to the premises, by a conveyance from Hixie Jones, and her husband, James C. Jones, who died in January, 1844. This deed was offered in evidence and upon it is the following endorsement. "The private examination of Hixie Jones, wife of James C. Jones, taken by Charles A. Hill, a member of the Court, which being satisfactory, it is ordered to be recorded;" signed, "C. A. Hill, J. P. March term, 1823, Court of Pleas and Quarter Sessions." After this, but at the same term of the Court, is the Clerk's certificate of the probate of the deed, by William Arendel, one of the subscribing witnesses; and an order of registration. The defendant objected that the attachments were void, by reason of the defects already mentioned; and also that the sales under the attachments were not regular. Under the charge of the Court the jury found a verdict for the plaintiffs, and the defendant appealed.

No counsel for the plaintiffs in this Court.

W. H. Haywood, G. W. Haywood, and *H. W. Miller,* for the defendant.

NASH, J. The objection cannot avail the defendant. We have been so repeatedly called on to express our opinion upon this subject, that we had hoped, it would have been well known to the profession. The language of the Court in *King's case,* 5 Ired. 204, is emphatic—"the power resides in every Court, to amend the entry on its minutes, or the records of its orders and judgments, *nunc pro tunc,* and that no Court could *incidentally* question the verity of the record as amended." When the amendment is ordered, it is the duty of the clerk to obey the order; not by entering it on the record to be amended, but altering the record itself, so as to answer to the amendment, and, when so amended, it stands as if it never had been defective. When therefore, the clerk gives a transcript of the record, it must be so amended, exclusive of the order; and if he sets forth in the transcript, when and how he altered it, it is surplusage: being no part of *that* record. We must take the record to be, as it is certified to us by the proper officer; we are not at liberty to look beyond it, to enquire how it came to be as it is. *Galloway's Admr.* v. *McKeethan,* 5 Ire. 12.

The second objection is, that the interests of John C. and Atlas Jones, in the land, were sold at one bid, instead of being sold separately. There is no allegation of fraud in the transaction, nor is there any complaint on the part of the owners of the land, that their interests have been injured by the mode pursued. We admit it is unusual; but we do not see, that it is therefore contrary to law. The law points out no specific mode, in which a sheriff shall *conduct* the sale, but he is bound, by general principles, to sell the property levied on, in such way, as will probably raise the most money. The office of sheriff is a highly responsible one, and much discretion must, in

many cases, be allowed him. In this case, John C. and Atlas Jones, were owners of two undivided fifths of the lands sold; it might have been beneficial to them, to have their respective interest sold by the same bid; the land thereby might have produced more. But this was a question of fact, which, if pertinent to the case, ought to have been submitted to the jury, and we cannot say, as a matter of law, that the sale, for that case, is absolutely void. After the sale, the owners were each entitled to one half of the proceeds, and it was the duty of the sheriff to have applied the money to the executions accordingly. *Wilson* v. *Twitty*, 3 Hawk. 44. *Thompson* v. *Hodges*, 3 Hawks 51. *Davis* v. *Abbott*, 3 Ired. 139. It is admitted by the defence, that the land was liable to be sold under the executions, the objections to the amendment of the attachments, and the one we are now considering, being removed. The owners of the land do not complain, and the purchaser is seeking to enforce his rights under it.

This brings us to the last objection, made by the defendant to the plaintiff's right of recovery. He alleges the title to be in himself, and, to prove it, produced on the trial a deed from Hixie Jones, and her husband Jas. C. Jones, to one Harrison under whom he claims. It is admitted that without a private examination of a *feme covert*, had, in in one of the modes pointed out by the act of the General Assembly, her deed conveys no estate in her lands. In the case of *Burgess and others* v. *Wilson*, 2 Dev. 306, the manner in which, in every case, the private examination is to be conducted, is so fully and distinctly pointed out, that we content ourselves by referring to it. The very point we are now called on to decide is settled in that case, that when the wife is capable of attending Court, the deed *shall* be acknowledged by both husband and wife in Court, and then the wife be privily examined by some one of that Court. In the case before us, Mrs. Jones was present, but there was no acknowledgment of the execution of the deed, in Court, either by her or her

husband. Nor, indeed, as far as the certificates or the conveyance show, does it appear, she ever has legally acknowledged the execution of the deed, or been privily examined as required. *Lucas* v. *Cobb*, 1 Dev. and Bat. 228. It is void, and conveyed to Harrison no estate in the land, and the defendant's claim under it is of no avail.

PER CURIAM. Judgment affirmed.

BENJAMIN BROOKSHIRE *vs.* WILEY BROOKSHIRE.

A power of Attorney, though under seal, may be revoked by parol.

A plaintiff in an action of assumpsit, cannot be non suited, though the verdict of the jury is for less than sixty dollars, if he files an affidavit in the words of the Act of Assembly, *Rev St. Ch.* 31, *Sec* 42, "that the sum for which his suit is brought" (being over sixty dollars) "is really due, but for want of proof, he cannot make recovery."

What number of witnesses shall be taxed for a party, who recovers, is a matter of discretion in the Court below, and cannot be reviewed in the Supreme Court.

Appeal from the Superior Court of Law of Randolph County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

This was an action of assumpsit brought in the Superior Court of Randolph.

The following was the case: The plaintiff was employed by the defendant and others, as an agent, to go to Alabama, and settle the estate of their brother, and re-

ceive from the executor, his share thereof, and bring it to this State. The appointment of the plaintiff was by deed. He made one trip, and after returning home he made a second, when he was shown by the executor a letter from the defendant, revoking the power, before given, so far as he was concerned. The action was brought to recover the defendant's aliquot portion of the expenses of both trips, and also the commissions of ten per cent., on the distributive share of the defendant. It was admitted by the defendant that he was bound for one sixth part of the expenses of the first trip, but insisted he was bound for no part of the second; as upon the return of the plaintiff, he had revoked the power of attorney by parol. There was contradictory evidence of the parol revocation. On the part of the plaintiff, it was contended, that the power, under which he acted, being an instrument under seal, it could not be revoked, but by an instrument of equal dignity, and that, therefore, whether the revocation was attempted by parol, after the termination of the first trip, or by the letter, upon his return to Alabama, it was equally inoperative, and he was entitled to recover the defendant's share of the expenses of both trips.

His Honor charged the jury, that if they believed there was a parol revocation of the power of attorney, before the plaintiff started upon the second trip to Alabama, they should allow damages to the amount of one sixth of the expenses of the first trip: and if they should find, that there was no revocation before the plaintiff left on the second trip, but that the power was revoked, by letter, after he reached Alabama; in that case they should allow damages, for the expenses of the first trip, and also for his expenses in going to Alabama the second time, but not his expenses home.

The jury returned a verdict for $43 16, being the defendant's share of the expenses of the first trip, and his share of his expenses out, the second. The defendant then moved to nonsuit the plaintiff, whereupon the plain-

tiff filed an affidavit, under the Act of Assembly, *Rev. St. Ch.* 31, *Sec.* 42, setting forth, that the sum of $152, for which his suit was instituted, was justly due him from the defendant, but that he had failed to recover said sum for the want of proof of the amount really due. The Court refused the motion. A motion was then made by the defendant, to tax the plaintiff with such of his witnesses, there being in all twenty-three, as were not necessary to prove his account, and such as were examined, as to the commissions. The motion was refused, upon the ground, that they all were examined, and testified to some material fact.

The plaintiff then moved for a new trial for misdirection of the Judge, in charging the jury that the power of attorney could be revoked by parol, or by letter. This motion was also over-ruled and both parties appealed.

J. H. Haughton, for the plaintiff.
Iredell, for the defendant.

Nash, J. It is not denied by the plaintiff, that, in this case, it was within the power of the defendant to put an end to his agency, by revoking his authority. Indeed, this is a doctrine, so consonant with justice and common sense, that it requires no reasoning to prove it. But he contends, that it is a maxim of the common law, that every instrument must be revoked by one of equal dignity. It is true an instrument under seal cannot be released or discharged by an instrument not under seal or by parol, but we do not consider the rule as applicable to the revocation of powers of attorney, especially to such an one as we are now considering. The authority of an agent is conferred at the mere will of his principal and is to be executed for his benefit; the principal, therefore, has the right to put an end to the agency whenever he pleases, and the agent has no right to insist upon acting, when the confidence at first reposed in him is withdrawn. In this

case, it was not necessary to enable the plaintiff to execute his agency, that his power should be under seal; one by parol, or by writing of any kind, would have been sufficient; it certainly cannot require more form to revoke the power that to create it. Mr. STORY, in his treatise on agency, page 606, lays it down that the revocation of a power may be, by a direct and formal *declaration* publicly made known, or by an *informal writing*, or by parol; or it may be implied from circumstances, and he no where intimates, nor do any of the authorities we have looked into, that when the power is created by deed, it must be revoked by deed. And, as was before remarked, the nature of the connection between the principal and the agent seems to be at war with such a principle. It is stated, by Mr. STORY, in the same page, that an agency may be revoked by implication, and all the text-writers lay down the same doctrine. Thus, if another agent is appointed to execute powers, previously entrusted to some other person, it is a revocation, in general, of the power of the latter. For this proposition, Mr. STORY cites, *Copeland* v. *The Marine Insurance Company*, 6 Pick. 198. In that case, it was decided that a power, given to one Pedrick to sell the interest of his principal in a vessel, was revoked by a subsequent *letter of instruction* to him and the master, to sell. As then, an agent may be appointed by parol, and as the appointment of a subsequent agent supersedes and revokes the powers previously granted to another, it follows, that the power of the latter, though created by deed, may be revoked by the principal, by parol. But the case in Pickering goes further. The case does not state, in so many words, that the power granted to Pedrick, was under seal, but the facts set forth in the case, show, that was the fact; and, if so, is a direct authority in this case. This is the only point raised, in the plaintiff's bill of exceptions, as to the Judge's charge.

We presume the motion intended to be made by the

defendant, with respect to the costs, was, that he should not be taxed in the bill, with more than two of the plaintiff's witnesses, to prove each fact, necessary to sustain his case. The act of 1856, *Rev. Stat. ch.* 31, *sec.* 76, after providing that the person in whose favor judgment shall be given, shall recover his costs, further goes on to say, "provided that the party cast, shall not be obliged to pay for more than two witnesses, to prove any single fact." The practice upon this section of the law has uniformly been, not to throw upon the successful party, the payment of any of his witnesses, because he has testified to a fact, already proved by two others, provided he also proves some other material fact. His Honor has certified that such was the case here. The defendant's motion was therefore properly over-ruled for this reason. Besides, this Court cannot undertake to review decisions upon such questions.

The defendant's motion to non-suit the plaintiff was properly over-ruled. The Legislature has limited the jurisdiction of the Superior Courts, in matters of contract, to all sums over sixty dollars, when due by open account, &c. and to one hundred dollars when due by bond, note, or liquidated account, *Rev. Stat ch.* 31, *sec.* 40, and by the 42nd section, it provides, that if any suit shall be commenced in any Superior Court for a greater sum than is due, with an *intent* to evade the law, and by the verdict of a jury it shall be ascertained that a less sum is due to him, than the Superior Court has jurisdiction of, it shall be the duty of the Court to non-suit the plaintiff, unless he files an affidavit, that the sum, for which his suit is brought, is really due, *but for want of proof*, &c. he can not make recovery; in which case he shall have judgment for the sum ascertained by the verdict. In this case, the affidavit of the plaintiff, in the words of the act, was made and filed.

Per Curiam. Judgment affirmed, on each appeal, and each appellant must pay the costs of his appeal.

WILLIAM CARRAWAY *vs.* MOSES COX.

Where a witness is equally interested on both sides, he stands indifferent. And, therefore, where the plaintiff alleged, that one W. was indebted to him and the defendant agreed to pay the debt, *held* that W. was a disinterested and therefore a competent witness.

The cases of *Ligon* v. *Dunn*, 6 Ire. 133, and *Cummins* v. *Coffin*, 7 Ire. 196, cited and approved.

Appeal from the Superior Court of Law of Wayne County, at the Fall Term, 1847, his Honor Judge MANLY presiding.

This was an action of assumpsit. The only question presented in the case, is, as to the competence of a witness. One William Westbrook, being indebted to the plaintiff, it was, as the plaintiff alleges, agreed between him and the defendant, that the latter should pay the debt. No question is made, as to the sufficiency of the consideration for the promise of the defendant, or to its being by parol. On the trial, Westbrook was tendered as a witness, to prove the agreement between the plaintiff, and the defendant. Objection was made to his competence, and sustained by the Court, and the plaintiff was nonsuited. And from the judgment the plaintiff appealed.

Mordecai, for the plaintiff.
J. H. Bryan, for the defendant.

NASH, J. We think there was error in the opinion given by his Honor below.

It is the well settled rule, that when the witness is equally interested on both sides, he stands indifferent.

Smith v. *Harris*, 3d Eng Com. L. R. 238. There the action was for giving a false credit to Hollingsworth. His testimony was objected to, on the ground that he was interested. but was received by the Court as he stood indifferent, being liable to the plaintiff, for the goods sold if the action against the defendant failed, and liable to the latter if it succeeded. Upon the same principle, the witness was held competent in the cases of *Martineau and others* v. *Woodland*, 12 E. C. L. R. 32, and in *Hewitt* v. *Thompson*, 12 do. p. 178, and in *Collins* v. *Gwynn*, 23 E. C. L. R. 380. In the case *Lovet & Browne* v. *Adams & others*, 3 Wendell 380, a co-obligor was held to be a competent witness for the plaintiff to prove the execution of the bond. In this Court the same point has been decided in the cases of *Ligon* v. *Dunn*, 6 Ired. 133, and *Cummins* v. *Coffin*, 7 Ire. 196. And Justice SAVAGE in the *Bank of Utica* v. *Hillard*, 3 Cow. 160, lays down the rule we are discussing, very much as Lord KENYON does. To apply the principle of these cases to the present. The money, sought to be recovered by the plaintiff, was originally due from Westbrook, and the defendant, for a sufficient consideration, agreed with the plaintiff to pay it to him. Westbrook then stood entirely indifferent between the parties. If Cox paid the money to the plaintiff, it would be either a voluntary payment made by him, which would give him no claim upon Westbrook for its return, or he would pay the money as a surety, in which case he would have a claim, and in neither case, was Westbrook an incompetent witness. If the plaintiff failed in the action against Cox, Westbrook was still liable to him, upon the original contract; if he succeeded he would be liable to Cox, not only for the amount of the debt, but for the costs expended by him, in this case, so that his interest lay more in defeating, than in sustaining the action.

We have looked into the authorities cited by the de-

fendant, but do not think they interfere with the principle which governs this case.

PER CURIAM. Judgment reversed, and *venire de novo* ordered.

WILLIAM T. OWEN *vs.* GEORGE T. BARKSDALE.

In order to support the title of a purchaser at an execution sale, he must shew a judgment, execution, sale and conveyance to him by the officer by whom the sale purports to have been made.

The deed of a sheriff, reciting a judgment, execution and sale, is not evidence of those facts.

The sheriff is a competent witness to prove that there was a sale.

Where the sheriff's deed is an ancient one and possession has been held under it, a presumption of a sale may arise from the contents of the deed.

The cases of *McEntyre* v. *Durham*, 7 Ire. 152, and *Carter* v. *Spencer*, 7 Ire. 14, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This is an action of trespass *quare clausum fregit*. On the trial, in order to show title, the plaintiff offered in evidence the transcript from the records of the County Court of Sampson, showing a judgment and *venditioni exponas*, in behalf of Holmes and Bunting against one Harman Owen, and a sheriff's deed covering the land in question. The defendant insisted that no sale being en-

dorsed on the execution, or otherwise made to appear, the sheriff's deed was not evidence of the fact. It was further insisted by the defendant, that it did not appear by the sheriff's deed, or otherwise, that any sale had been made by the sheriff, under a *venditioni exponas*, corresponding with the judgment in favor of Holmes and Bunting. The sheriff's deed to the plaintiff, which is made a part of the case, recites, as his authority for selling the land, a *venditioni exponas* against Harman Owen, but does not set forth the name of the plaintiff, and was for a different sum from that in the execution produced; nor does it appear that any execution, in the name of Holmes and Bunting against Harman Owen, ever was in the hands of the sheriff. The presiding Judge, was of opinion, that, under the circumstances, the sheriff's deed conveyed no title to the plaintiff, who thereupon submitted to a non-suit, and appealed.

No counsel for the plaintiff.

Strange and *W. Winslow*, for the defendant.

Nash, J. In the opinion of the Judge below we entirely concur. The plaintiff claims to be a purchaser at an execution sale, made by the sheriff. In order to sustain his title, it is sufficient for him to show a judgment, execution sale, and the sheriff's deed. He did show a judgment in favour of Holmes and Bunting against Harman Owen and an execution, but he has entirely failed to show, that that execution, or any other sufficient one, ever was in the hands of the sheriff, or was so, at the time of the alleged sale. The sheriff's deed is not evidence of the fact; nor does it set forth that execution or any other valid one. It is true the recital in a sheriff's deed is no part of it; the deed is good without it, and of course if he misrecite the execution under which he sells, or recites no execution, his sale is nevertheless good, if, at the time he makes it, he has, in his hands a valid

one. But a more serious objection to the plaintiff's recovery is, that there is no evidence in the case, that the sheriff ever did make any sale of the land in dispute. When a sheriff receives an execution, it is his duty to levy it, and make public sale of the property so levied on; he cannot deliver it to the plaintiff in the execution in satisfaction of his debt, nor can he sell it at private sale; and until he does sell it as the law directs, his deed can convey no title to the purchaser. It is the judgment, execution, sale, and conveyance by him, that completes the conversion of the property.

There is no return upon the venditioni exponas, by the sheriff, of any sale; nor is it essential there should be. When made, it is not conclusive on the parties, but may be controverted, and if omitted, may be supplied by testimony *aliunde*. The sheriff himself would have been a competent witness to prove the fact. *McEntire* v. *Durham*, 7 Ired. 152. *Carter* v. *Spencer*, 7 Ired. 14. Here, there is not the slightest evidence of any sale by the sheriff, apart from his deed, nor is it shown he ever had in his hands any valid execution whatever. If the deed were an ancient one, and possession had been held under it, a presumption of a sale might arise from the contents of the deed.

PER CURIAM. Judgment affirmed.

LAW LIBRARY

THE STATE *vs.* WILLIAM S. PRIDGEN.

Where A. had possession of a tenement, consisting of a main building and a shed attached, and locked the door of the shed in which he had some tools, &c., and, leaving a tenant in possession, went away intending to return; and afterwards the tenant admitted B. into the peaceable possession of the main building. *Held*, that B. was not indictable for a forcible entry in breaking into the shed and assuming possession of that.

When the main body of the house ceased to be, in law, the dwelling house of of A. each room lost that character.

The case of *The State* v. *Curtis*, 4 Dev. & Bat. 222, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

This is an indictment at common law, for a forcible entry into the dwelling house of one Kitchen.

The house was situated on a tract of land, which had belonged to one Herring, who contracted to sell it to Kitchen, and covenanted to convey in fee upon the payment of the purchase money; and he let him into possession. After Kitchen had been in possession about three months, a difference arose between him and Herring, about their bargain; and the latter then conveyed to the defendant, Pridgen. The dwelling-house contained several rooms in it; and there was attached to it a shed, one end of which was open, and used as a piazza, and at the other end there was a room, in which Kitchen kept a trunk, some tools and other articles. He hired a man, named Caudle, and his wife, to work and cook for him; and they lived in the dwelling house with Kitchen. On a particular day, Kitchen being about to leave home, locked the door of the shed-room, and took the key. He then went away, leaving Caudle and his wife in the house,

and directing them not to let any one in. After he had gone, the defendant came to the house with Caudle and another person to take possession of it; and the defendant was let in by Caudle, and took possession without objection from Caudle. After he had thus taken possession, he asked where Kitchen's property was, and was told by Caudle that it was in the shed-room; and the defendant then broke open the door of that room, and with the assistance of Caudle removed the things out of the room.

The Court instructed the jury, that, if Caudle was left in possession of the main body of the house, and had let the defendant into it, the defendant was not guilty on that part of the case; but that, if Kitchen had put his property in the shed-room, and locked it, and carried away the key, then the breaking open the door of that room, and taking out Kitchen's property, made the defendant guilty of a forcible entry on that part of the case. The defendant, being convicted, appealed.

Attorney General, for the State. referred to

Rex v. *Wilson*, 8 T. Rep. 357. *Leonard's Case* 11 Johns. Rep. 504. *Rickett's Case*, 8 Cowen 226. *State* v. *Pollok*, 4 Ired 303. 1 *Hawkins, Ch.* 28. *Sec.* 26. *State* v. *Fort*, 4 D. & B. 192. *State* v. *Armfield*, 5 Ired. 207. *State* v. *Toliver*, 5 Ired. 452. 1 *Russ. on Crimes*, 287.

Strange, for the defendant, argued—that the defendant was entitled to a new trial.

1. Because having title to the premies and the indictment being at common law, he was guilty of no offence. 1 *Hawk. P. C. Ch.* 28, head, Forcible Entry and Detainer, *Sec.* 1, 5. *McDougald* v. *Sitcher*, 1 Johns. Rep. 42—that the defendant had a right of entry, 1 *John.* 42, *ut supra* and *Walton* v. *File*, 1 Dev. & Bat. 567.

2. Because either he did not enter the dwelling-house of Kitchen as charged, or he entered peaceably. The shed-room could not be considered the separate dwelling of Kitchen. 1 *Hawkins P. C. Ch.* 17, *Sec.* 32, 33. But if it was, no person being therein, the entry was not forcible. 1 *John. Rep.* 42, *ut supra.* *State* v. *Bennett*, 4 Dev. & Bat. 48. If it was not, then the entry into the main building being by and with the consent of Caudle, the tenant, and otherwise peaceable, no subsequent force could make him indictable. *State* v. *Johnson & Rose*, 1 Dev. & Bat. 324.

RUFFIN, C. J. The Court is not, upon this appeal of the defendant, called on to speak of the position first laid down to the jury. Perhaps its correctness might be found to depend much upon some enquiries of fact, to be passed on by the jury, as to a dishonest concert of Caudle with the defendant to surrender to him his employer's possession. It is the other part of the instruction, on which the verdict was founded, that is now before us. It does not seem to the Court to be correct; and on that ground, without considering any other point, made at the trial, we think the verdict must be set aside.

That part of the instruction, taken in connection with the evidence, and with the previous part of the charge, assumes, that in fact and law, the defendant had peaceably and justifiably entered the house, and was peaceably possessed of all that part of it, which is called the main body. That being so, the defendant, we think, was not guilty of an indictable trespass in breaking into the other room. That room had never been severed from the other parts of the house, so as to make it a several tenement, and give it a distinct character, as the dwelling-house of Kitchen. The whole was but one dwelling-house; and it was the dwelling-house of Kitchen exclusively, for Caudle had no possession of his own, but was

there merely as a servant. *State* v. *Burtis*, 4 Dev. and Bat. 222. When the defendant had gained peaceable admission into the house, and claiming as owner, and having in fact the title, had taken actual and peaceable possession of the whole, except the one room, we think that room, though locked, cannot be treated as a distinct tenement, and as the dwelling-house, separately, of Kitchen, to which the new possession did not extend. Under such circumstances it seems clear, that it could not be laid as his dwelling-house in an indictment for burglary by a third person. When the main body of the house ceased to be, in law, the dwelling house of Kitchen, each room lost that character. The whole was but one tenement; and when the defendant took the possession, that of Kitchen ceased throughout, and the defendant was not guilty of successive forcible entries, as, from one room, he entered into another.

PER CURIAM. *Venire de novo* ordered.

FRANKLIN H. HOOKS *vs.* AARON F. MOSES.

Where on a warrant against an administrator for debt, the magistrate before whom it was returned, made the following entry, "Judgment confessed to the officer by the administrator for the sum of, &c. April 24, 1845." Signed by the magistrate. *Held*, that this was a valid judgment against the administrator.

One, against whom a judgment before a magistrate has been obtained, cannot attack that judgment collaterally, on the ground that he was not duly served with process, or notified of the day and place of trial. But to avail himself of these objections, the defendant must impeach the judgment directly by application to the magistrate or to a higher tribunal to set it aside or to reverse it.

In this case, in an action upon the judgment, the defendant cannot plead *plene administravit*, being fixed with assets by the judgment.

The cases of *Skinner* v. *Moore*, 2 Dev. & Bat. 152, and *Burke* v. *Elliott*, 4 Ired. 356, cited and approved.

Appeal from the Superior Court of Law of Wayne County, at the Fall Term, 1847, his Honor Judge MANLY presiding.

The plaintiff issued a warrant in debt on a note against the defendant as the administrator of John J. Briggs, deceased. It was returned by the constable, "Executed;" and the Justice of the Peace made thereon the following entry: "Jugment confessed to the officer by the administrator, Aaron F. Moses, for the sum of fifteen dollars with interest from the first day of January, 1843, and costs. April 24, 1845. *Signed*, "L. Cogdell, J P." On the same paper the magistrate made further entry: "Execute the goods and chattels of the deceased, and sell to satisfy the above judgment and costs. April 24, 1845." *Signed*, "L. Cogdell, J. P."

The constable returned thereon *nulla bona*. On the 10th of June, 1847, the plaintiff brought the present writ

by warrant in debt on the above, as a judgment, suggesting a *devastavit*, and seeking to recover from the defendant *de bonis propriis*; and, after a judgment for the plaintiff, out of Court and appeals, the case came on to be tried in the Superior Court, on the plea of *nil debet*, that there was no such judgment; and fully administered.

For the defendant it was insisted, that the entry on the original warrant of the 24th of April, 1845, was not a judgment by the magistrate, but simply a memorandum of a conversation between him and the officer and nothing more: And, secondly, that, if to be considered a judgment, it was not valid against the defendant, because he was not summoned to appear for trial at any particular time or place. The first point the Court reserved by consent of the parties. On the other, the defendant offered the constable, who returned the warrant, as a witness; and he deposed, that he did not give the defendant notice of the time and place of trial; but that the reason was, that, when he served the warrant, the defendant told him, he did not wish to attend the trial, and was willing a judgment should be rendered against him. Upon this evidence the Court directed the jury to find the issues for the plaintiff; which was done. But the Court, being afterwards of opinion for the defendant on the point reserved, set aside the verdict, and ordered a nonsuit, under the agreement, and the plaintiff appealed.

Mordecai, for the plaintiff.
Husted, for the defendant.

RUFFIN, C. J. The Court does not concur with the opinions given by his Honor. The proceedings before single magistrates are generally informal, and the Legislature requires, that they shall be favourably considered, if they

can be seen to be substantially sufficient. It seems to be straining this entry most unreasonably, when it is read as nothing more than a memorandum of a conversation between the magistrate and the constable. To what end would a memorial be made of such a conversation? Would the Justice have thought of issuing an execution on it? Or can we understand the Justice to have supposed, that the constable could take a confession of judgment, to be entered by the magistrate afterwards? Is it not, rather, to be understood, that the Justice meant to say, that he did not give a judgment by default, but that the defendant confessed the debt to the constable, and that he, the magistrate, gave the judgment on the evidence of the Constable? This last seems to the Court to be the fair and reasonable interpretation of what was done by the Justice. The entry was intended as a judgment by some one; and whether the magistrate entered it as the judgment of himself, or of the constable, cannot be seriously doubted. The judgment must therefore be reversed, and judgment entered for the plaintiff upon the verdict.

What has been said is sufficient to dispose of the cause. Yet we think it incumbent on us to say further, that the defendant ought not to have been allowed to attack the judgment on the other ground, that he was not duly served with process, or notified of the day and place of trial. Doubtless those are proper grounds for impeaching the judgment; but that must be done directly upon an application to the magistrate, or to a higher tribunal, to set it aside, or reverse it for that cause, and is not open to the party collaterally, when an execution is issued or debt brought on the judgment. Such is conclusively settled to be the law in respect of judgments of Courts of record. *Skinner* v. *Moore*, 2 Dev. & Bat. 152. *Burke* v. *Elliott*, 4 Ired. 356. It is true, that it was otherwise at common law in respect of the proceedings of inferior tribunals, not

proceeding according to the course of the common law. But that has been altered here by the *Rev. St. Ch.* 31, *Sec.* 108; which, in re-enacting 11, 4 *Hen.* 4 *C.* 23, altered it by including judgments before a single magistrate having jurisdiction of the subject, and putting them on the same footing with those in a Court of record. It is implied then, until the judgment be set aside or reversed, that the magistrate found, that the warrant was not only executed, but duly executed by the appointment of some certain day and place of trial; and that judgment proves itself to be right and the matter cannot be enquired of incidentally.

It is to be further remarked, that the plaintiff is entitled to judgment notwithstanding the verdict is silent on the issue on the plea of *plene administravit*, for that plea was immaterial as the former judgment is conclusive of assets. *Erving* v. *Peters*, 3 T. R. 685. Act of 1828, *Rev. St. Ch.* 46, *Sec.* 25.

PER CURIAM. Judgment for plaintiff.

PATRICK McDOWELL *vs.* STEPHEN BRADLEY.

Where a party, appealing from the County to the Superior Court, has given but one surety on his appeal bond, the Superior Court may supply this defect by permitting the appellant to give a bond with two sureties in the latter Court.

On such a bond the same summary judgment may be rendered, as if it had been regularly taken in the County Court.

The cases of *Ferguson* v. *McCarter*, No. Ca. Term. R. 107, *Wallace* v. *Corbit*, 4 Ired. 45, *Fox* v. *Steele*, 1 Law Repos. 379, and *Rosseau* v. *Thornberry*, 2 Law Repos. 442, cited and approved.

Appeal from the Superior Court of Law of Edgecombe County, at the Fall Term, 1847, his Honor Judge BATTLE presiding.

This suit was brought in the County Court, and, after a verdict and judgment against the plaintiff, he appealed to the Superior Court; but he gave bond with only one surety. At the term at which the transcript was filed, the defendant moved to dismiss the appeal, because there was but one surety to the appeal bond. The plaintiff then shewed, that the defendant had, during that term, summoned witnesses; and, by leave of the Court, he filed a new bond with two sufficient sureties for the prosecution of the appeal. Whereupon, the Court refused the defendant's motion; but allowed him an appeal.

No counsel for the plaintiff.
B. F. Moore, for the defendant.

RUFFIN, C. J. The Court thinks the decision of his Honor right. No weight is allowed to the circumstance, that the defendant took out subpœnas, as he might not then have known of the deficiency in the bond; and the

motion, we think, is in due time at the first term and before the trial begins. It is not within any of the cases, in which it has been held that the appellee waived his right to a better bond by his laches; for in neither of them was the motion at the first term. *Ferguson* v. *McCarter*, No. Ca. T. R. 107. *Wallace* v. *Corbit*, 4 Ired. 45. Unless waived by his delay, the statute expressly requires that number at least; and the Court would have been bound to dismiss this appeal, if such a bond had not been given. But we think the new bond was an answer to the defendant's motion; for it fully meets the purposes of the act and the ends of justice, by effectually securing the appellee, and, substantially, by the means prescribed in the statute. Although the proper bond was not taken at the proper time, yet the Court has the power to supply the omission; as was done with respect to *certiorari* bonds in the cases of *Fox* v. *Steele*, 1 Law Repos. 379, and *Rosseau* v. *Thornberry*, 2 Law Repos. 442. The act of 1810, *Rev. Stat. ch.* 4, *sec.* 16, requires the clerk of the County Court to take the bond, as in cases of appeals, and send it up with the record; yet upon a motion to dismiss, for the want of such a bond, the plaintiff in the *certiorari* was allowed to give a proper bond in the Superior Court.

It was argued, that this plaintiff should have been put to his *certiorari*; because on the bond then to be given, there would be a summary judgment, which cannot be on the present one. If there were the difference in the remedy supposed, it does not follow that the delay and expense should be thrown on the plaintiff, which would arise from dismissing the appeal. But, we think, the objection is founded on a mistake as to the remedy. It is clearly in the power of the Court, to require from time to time further security for the costs from the plaintiff, and the sureties in the new bonds are bound for all the costs, at whatever period accrued; and, certainly since the Act of 1831, *Rev. St. Ch.* 31, *Sec.* 133, they are liable sum-

marily. The acts giving the summary judgments, being remedial, are to be construed literally, as authorising judgments on motion upon all bonds, given at any stage of the case, for the prosecution of a suit on an appeal.

This opinion will be certified to the Superior Court.

PER CURIAM. Ordered accordingly.

STATE TO THE USE OF ATKINSON JEFFREYS vs. THOMAS L. LEA.

A sheriff cannot apply money in his hands, which he has collected on an execution in favor of A., to the satisfaction of an execution in his hands against B., though *it seems* he may levy an execution on money in the possession of the debtor.

The case of *Overton* v. *Hill*, 1 Murph. 47, cited and approved.

Appeal from the Superior Court of Law of Caswell County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

Debt on the bond given by the defendant Lea, as sheriff of Caswell. The breach assigned is in not paying to the relator a sum of money, collected by a deputy of the defendant on a *fieri facias*, on a judgment of a Justice of the Peace, in his favour against one Palmer. Plea, conditions performed. On the trial the defence was, that the deputy had at the same time a *fieri facias* on a judgment of a Justice of the Peace, for a larger sum in favour

of Palmer against the relator; and that on receiving the money for the relator on his execution, he applied the same to the satisfaction of the execution against him. Upon evidence to that effect the defendant prayed the Court to instruct the jury, that he was not liable in this action. But the Court refused to give that instruction; and directed the jury, that the defendant was liable in this action for the sum collected for the relator, unless he consented to the application, which the deputy made of the money. Verdict and judgment against the defendant and appeal.

Morehead, for the plaintiff.
E. G. Reade, for the defendant.

Ruffin, C. J. It seems to be the received doctrine in England, that money cannot be taken on a *fieri facias*. It has, however, been laid down by the highest Court in this country, that, when in possession of the debtor, it may be. *Turner* v. *Fendall*, 1 Crouch 117. On that point, we believe, that case has been generally approved. It also determined, that the sheriff cannot apply to the satisfaction of an execution against a person, money, which he received on an execution in favour of that person. For, until it be paid over to the party it is not his goods. The Courts have exercised a jurisdiction, where there are mutual judgments between two persons, to have one set against the other, and satisfaction accordingly entered—especially, when one of the parties is insolvent. That is not at all under the statute of set-off, as the judgments are already existing, and the opportunity for pleading the set-off has passed. It is an instance of a summary equitable jurisdiction over suitors, exercised for the saving of expenses and the promotion of justice. So, too, there have been cases, in which money, raised on an execution for a person, has been applied by the Court to a judgment there against that person or to an execution in the hands

of the sheriff. But this last is not obligatory on the Court in every case. *Overton* v. *Hill*, 1 Murp. Indeed, more recently the notion seems to be prevailing in England, that it ought not to be done in any case. *Knight* v. *Criddle*, 9 East. 48. *Williams* v. *Barr*, 2 N. R. 376. However that may be, the jurisdiction, supposing it to exist, belongs to the Court and not to the ministerial officers. He cannot go out of his writ, and has no power to apply money, which he owes to, or has received for, a defendant, in discharge of an execution against him or his property. There is no authority for such a power in the sheriff; and that of *Turner* v. *Fendall*, is a most respectable one against it. It has, moreover, been several times decided in this State, that money thus in the hands of a sheriff cannot be attached. *Overton* v. *Hill*, 1 Murph. 47.

PER CURIAM. Judgment affirmed.

SHEM KEARNEY vs. ELIZABETH JEFFREYS.

In proceedings under the Act directing how damages may be recovered for injury done by stock to inclosed grounds, if one of the parties appeal to the County Court from the judgment of the magistrate, the case must be tried by a jury as in other suits, and there can then be no objection received to any irregularity in the proceedings before the magistrate.

Appeal from the Superior Court of Law of Granville County, at the Special Term in November 1847, his Honor Judge BATTLE presiding.

This is a proceeding under the Act giving damages, to the owner of stock which has been injured by another. *Rev. St. Ch.* 48, *Sec.* 3. The plaintiff alleges, that his stock has been injured by the defendant, within her enclosed grounds, or by others acting under her authority. From the assessment made by the magistrate, and freeholders, and the judgment rendered thereon, the defendant appealed to the County Court and from the judgment of that tribunal to the Superior Court. In each Court, a motion was made by the defendant to quash the proceedings for error. The error assigned in the case, is, that the magistrate in his warrant designates the name of one of the freeholders, to be summoned.

In the Superior Court, the motion was over-ruled. From this judgment, she was allowed to appeal.

McRae and *Waddell*, for the plaintiff.
Gilliam, for the defendant.

NASH, J. In the Act of '77 Ch. 121, the Legislature declare, for what trespasses committed by the stock of one man upon the enclosed grounds of another, the latter shall be entitled to compensation in damages, and how they shall be ascertained. The 2nd Sec. declares, what shall be a sufficient fence in law, to give the owner a right of complaint, for being trespassed on; and the 3rd directs, that upon complaint made to a magistrate, he shall cause two freeholders to be summoned, who, together with himself, shall view the fence of the person complaining, where the trespass is alleged to have been committed, and ascertain whether it is such as the law requires, and if it is, what damage he has sustained, and certify the same under their hands and seals. The damages, so assessed, are made recoverable before any tribunal having cognizance of them. The 4th Sec. makes

provision for the recovery of damages by the owner, for injury committed to it, and directs the same proceedings, as in the 3rd Sec. It is under this section, that these proceedings have been instituted. This Act gave no appeal to either party. The report made by the magistrate and the two freeholders, was conclusive. *Nelson* v. *Stewart*, 2 Mur. 298. The oppression and injustice, which might be effected under a proceeding so contrary to the principles of the common law, came under the consideration of the Legislature at its session in 1831. *Ch. 2, Sec. 2, 3.* This Act changed the mode of obtaining judgment for the damages assessed by the magistrate and freeholders, and authorised the magistrate to give a judgment forthwith, if the damages were not immediately paid. It also removed the objectionable feature of the old law, by giving the right of appeal to either party. And it directs that when the case is carried into the County Court, the trial shall *be in all respects de novo;* the parties are permitted to plead, and issues are to be made up, as in cases of actions of trespass. This provision extends to injuries of both kinds. In either case, the cause in the appellate Court, becomes, as to all subsequent proceedings, a regular suit. The proceedings before the magistrate and the freeholders, then, answer no other purpose, than as the foundation of bringing the case into Court, and the Court could take no notice of any defect in the certificate of the magistrate, and the freeholders, because it is superseded by the appeal. This results from the special provisions of the Act of '31. But it does not follow, that the party considering himself aggrieved by the judgment of the magistrate, cannot have a revision of any errors in the proceedings before him. Two remedies are provided him, if any does exist in the proceedings out of Court. The party injured, may remove his case into the Superior Court, by a writ of false judgment, where the errors complained of may be rectified; or, if

he wishes to place himself upon the merits of his cause. and to controvert the facts, he may demand a trial by a jury, in the way pointed out in the Act. If the defendant in this case had chosen the former course, there is little doubt, the proceedings would have been quashed, for the want of seals to the certificates of the magistrate and freeholders. Then, as to the alleged defect in the warrant, while it is admitted, that, in every case, the process, which stands in the place of a declaration, must show a case, substantially within the jurisdiction of the magistrate, yet we think the particular objection here made, cannot avail. It refers, exclusively, to the mode of designating the freeholders, and, therefore, if a good objection at all, is immaterial to the controversy in the present stage of it, since, as we have already shown, the proceedings of the freeholders, were vacated by the appeal. Consequently it is of no importance now, how they were summoned.

We see no error in the interlocutory judgment appealed from.

This opinion must be certified to the Superior Court of Granville County.

Per Curiam. Ordered accordingly.

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JOHN B. ETHERIDGE *vs.* WALTER R. JONES & AL.

Under our wreck laws, the master, owner, merchant or consignee of wrecked vessels or other property has a right to take possession of them and dispose of them as he may think proper, without any responsibility to the wreck-master for commissions or in any other respect.

Appeal from the Superior Court of Law of Currituck County, at the Fall Term, 1846, his Honor Judge PEARSON presiding.

The plaintiff was, by the County Court of Currituck, duly appointed a commissioner of wrecks for the district No. 4, and in the year 1845, while acting as such, the brig Moon was wrecked within that district. The plaintiff demanded of the defendant Kinsey, who was the captain, to be allowed to take into his custody the goods then on the beach, and such as might thereafter be saved from the wreck. This was refused by the captain, who told him, he could save the goods for the owners himself, and did not need his assistance. The plaintiff never did take any of the goods into his custody, but they were all re-shipped by the captain, and the other defendants assisted him in so doing. The action is brought under the Act of the General Assembly, passed at their session of 1844-45, ch. 58.

The Court instructed the jury that the plaintiff had no right to any commissions, as he had neither taken the wrecked goods into his possession, nor had he sold them. But under the Act of Assembly, he had a cause of action against the defendants, for any interference with his rights and privileges as commissioner, and that the refusal to let him take into his charge and custody the wrecked goods, was such an interference. Under this

charge the jury found a verdict for the plaintiff, and from the judgment thereon the defendant appealed.

Heath and *Jordan*, for the plaintiff.
A Moore, for the defendants.

NASH, J. The whole case turns upon the construction to be given to the Act, under which the action is brought. We do not concur with his Honor, in the view he has taken of it. The 4th section of the Act, is as follows: "In future, the commissioners of wrecks, shall be the only proper persons, to take charge of, advertise, or sell any vessel, cargo, or other wrecked property, that may be stranded or cast on shore, in their respective districts; provided that the owner, captain, merchant or consignee, or their agent, may, in the absence of the commissioner, &c. take charge of, or sell, or remove, such vessel, cargo, or other wrecked property." The 5th section, under which this action is brought provides, "and any person, who shall interfere with the rights and privileges of any commissioner shall be liable to such commissioner, in an action on the case, for such damages as the commissioner shall sustain by reason of such interference. The act is obviously intended to prevent any officious intermedling with property so situated, by irresponsible persons. The commissioner is the officer of the law, to take the property into possession, and see justice done the owners. If others have assisted in saving it, in his absence, he may demand it of them, and a refusal on their part to deliver it is, a violation of his rights, for which an action may be sustained. But by the proviso, in the 4th section, recited above, the master, or owner, or merchant, or consignee, is not such an officious intermedler: to each is reserved the right, in the absence of the commissioner, to take charge of the stranded property. From the case we gather, that the captain did take possession of the goods in the *absence* of the commissioner,

for it states, "that the commissioner demanded of the defendant Kinsey, who was the captain, to be *allowed* to take into his custody the goods &c." If they were not already in the possession of the captain, where was the necessity of any demand. If however the goods were not actually in the possession of any one, and the captain or owner, had refused to suffer the plaintiff to take them into his custody, and had himself taken possession, we do not believe his act would have been a tortious one. The Act of Assembly is badly drawn, and we must give to it such a construction as we think the Legislature intended, and which is to be gathered from all the language they use and the purposes of the Act. The goods then were rightfully in the possession of the defendant Kinsey, who was, *pro hac vice*, the owner. Does the Act require him to deliver them up to the commissioner upon his demand? Surely not; to what purpose should he do it? The latter part of the same section provides that "every commissioner shall receive for selling any wrecked property five per cent. &c. and in case of the *removal* of any wrecked property by the owner, merchant, consignee, or their agent, from the custody of any commissioner without a sale, the commissioner shall receive two-and-a-half per cent, &c." This two-and-a-half per cent. commissions are given to the commissioner, as a compensation for his trouble and the responsibility incurred by him in taking possession, or custody of the property. He did not take possession, or have the custody of the property, and therefore his Honor in his charge properly instructed the jury, that he was not entitled to any commission. But he further instructed them, that he was entitled to an action against the defendants for interfering with his rights. What rights? The only right interfered with was the right, as it is alleged, to take the property out of the possession of the captain. And for what purpose? Not to secure them, not to sell them, but simply to entitle him to his commissions of two

and a half per cent.; for the captain, if he had surrendered them, was at liberty, by the Act, immediately to withdraw them from the commissioner. Surely such was not the meaning of the Legislature. They could not have intended, to take from the unfortunate owner a portion of that which the sea had spared, and he had saved, to present it as a douceur to one, who had rendered no services and incurred no liability in saving the goods.

If the principle contended for in this case, on the part of the plaintiff, be correct, it will lead to this result; that all the commissioner has to do, is to arrive after the goods have been all saved, by the captain or owner, demand the possession, and if delivered to him, he immediately re-delivers them back, and pockets his commissions; if refused, he does not pocket the commissions, *eo nomine*, but damages to their amount; for the rule of damages would be, the loss he would sustain by the non-delivery.

We cannot believe such to be the true construction of the Act. The interference intended to be punished by the law, in damages, is an unlawful interference. The act of the captain in taking possession of the wrecked property, in this case, was a lawful act, and he was not bound to surrender them to the plaintiff, on his demand. His refusal to do so was no interference with any right or privilege secured to the plaintiff, and the other defendants who acted under his authority are protected by his immunity. The act was intended, not for the benefit of the commissioners of wrecks, but for that of the owners of the property. If, when the goods are stranded, there is no one of the persons enumerated in the act present, the law places the property in the hands of the commissioner, and no one can rightfully withhold it; if the captain or owner is present, and chooses to save the property without the aid of the commissioner, it cannot be the in-

tention of the Act, to forbid their so doing, or to punish them if they do.

Per Curiam. Judgment reversed, and *venire de novo* awarded.

THE STATE TO THE USE OF THE COUNTY TRUSTEE OF BRUNSWICK *vs.* ROBERT W. WOODSIDE & AL.

Under the Acts of Assembly, relating to the County of Brunswick, where a majority of the magistrates are required to do any act and they do not attend, those who are present may take the sheriff's bond and also lay taxes, and do all other things, required by the general law to be done by a majority of the justices.

Where a Court consists of more than two members, a majority is competent to do all the business, which the Court can do, when all the members are present, unless the Legislature otherwise direct.

Although the Clerk may not deliver to the sheriff an official copy of the list of taxables, yet if he proceeds, without such official list, to collect the taxes, he and his sureties on his bond are bound for the amount he may so collect; notwithstanding he could not have enforced the collection without such certificate from the clerk.

Under the Act of 1844, *Ch.* 43, *Sec.* 1, any acknowledgment or admission of the sheriff or other officer, where admissible against him, is also admissible against his sureties in an action on their official bond.

The cases of *The State* v. *Lane*, 4 Ire. 450, *Slade* v. *The Governor*, 3 Dev. 365, and *Kelly* v. *Craig*, 5 Ire. 131, cited and approved.

Appeal from the Superior Court of Law of New Hanover County, at the Spring Term, 1847, his Honor Judge Battle presiding.

State v. Woodside.

This was an action of debt upon the official bond of the defendant, as sheriff of the County of Brunswick.

The defendant, Woodside, was the sheriff of the county of Brunswick, whose duty it was, to collect the county taxes for the year 1842. The action is brought on his official bond, against him and his sureties, the other defendants. Two breaches are assigned: one, for collecting and not paying over to the relator, the county, poor, and school taxes. Secondly, for failing to collect and pay over. Upon the trial, the relator, in order to show the assessment of taxes for the year 1842, produced the records of the March Term, 1842, of the County Court of Brunswick, from which it appeared, that three magistrates only, were on the bench, when the taxes were laid for that year. To show, that the defendant, Woodside, had duly received the list of taxables, the relator proved, that a copy of it had been handed to him, from the clerk of the County Court, but that it was not signed, or in any other way authenticated by him. This evidence being objected to, it was proved, that the defendant, Woodside, had acknowledged, that he had received the taxes for that year, and had failed to pay them over. On the part of the defendants, it was objected; *first*, that it required a majority of the magistrates of the county to lay the taxes, and, as only three were on the bench, at the time the taxes were laid in 1842, the assessment was illegal, and, in fact, no taxes were assessed for that year. *Secondly*, if the taxes were legally laid, the only warrant or authority, which the sheriff could have to collect them, was a copy from the list filed in the office of the County Court Clerk, and properly authenticated by him; without which he could not collect. And *thirdly*, that his acknowledgment, as above stated, could not dispense with the copy of the tax list, nor was it any evidence against the sureties.

The Court being of opinion with the defendants, the plaintiff submitted to a judgment of non suit, and appealed to this Court.

Iredell, for the plaintiff.
Strange, for the defendants.

NASH, J. We do not concur with his Honor, in the view he took of this case. The first objection urged by the defendants, was fully answered by the plaintiff. By an Act, passed in the year 1831, *Ch.* 154, *Sec.* 1, the Court of Pleas and Quarter Sessions of Brunswick county, are required to arrange themselves in classes of five persons, for the purpose of holding the terms of the said Court. By the 3rd section it is enacted, "that the Justices appointed under this Act, to hold the said County Courts, shall be competent to do, and perform any matter, and exercise all the power and authority, which, by the existing laws of this State, seven Justices are authorised to do," &c.

By the 6th section, it is provided, "that in any case, where (by the existing law) a majority of the magistrates are required, and do not attend, those who are present, may proceed to take the sheriff's bonds, *and do any other business, that a majority is required to do, which shall be as valid, as if done by a majority of said Justices.*" This Act would seem to be sufficiently explicit. When a Court consists of more than two members, a majority is competent to do all the business, which the Court can do when all the members are present, unless the Legislature otherwise direct. *State* v. *Lane*, 4 Ired. 450. But to remove all doubt, if any should exist, by the Act of 1835, *Ch.* 43, *Sec.* 4, it is specially provided, "that the Justices appointed under this Act, to hold said Courts, or a *majority* of them, shall be competent to do, and perform any matter, and exercise all the authority and power, which by the existing laws a majority, or seven magistrates are

required to do." By the Acts of 1790, *Ch.* 331, *Sec.* 1, and 1814, *Ch.* 872, *Sec.* 18, a majority of the acting Justices of the county, were required to be present, to lay the county taxes, and these two Acts were embodied together into one Act in 1836, and in that form are re-enacted. *Rev. St. Ch.* 28, *Sec.* 1. But the Acts of '31 and '35 were not affected by the Act of '36, for it is provided, "that no Act of a private or local character, &c., shall be construed to be repealed" by it. *Rec. St. Ch.* 1, *Sec.* 8. The Acts of '31, and '35, are local laws, and are in full force in the county of Brunswick, and the tax laid by the Court in 1842, was legally assessed.

We think the second objection made, on the part of the defendants, is equally untenable as the first, so far as the question, involved in this case, is concerned. It is made the official duty of the several sheriffs of the State, to collect the taxes within their respective counties, *Rev. Stat. ch.* 102, *sec.* 43, and the several clerks of the County Courts are required, within a limited time, to make out and deliver to the sheriff of his county, "a fair and accurate copy of the returns made, designating therein the separate amount of taxes due, and accruing from each species of property, and the amount due from each individual." To enable the sheriff to *enforce* by distress the collection of the taxes, from the individual, who has given in his property, as required by law, he must be provided with a copy of the returns in the office of the clerk, duly certified by the clerk, that the tax-payer may see the amount, which he is bound to pay; otherwise he may refuse to pay, and the sheriff cannot distrain his property; the certified copy, is his warrant of distress to collect the taxes, *Slade* v. *the Governor*, 3 Dev. 365. *Kelly* v. *Craig*, 5 Ired. 131; and it is the duty of the sheriff to apply to the clerk in proper time for such a copy. But it is not necessary for him to have the copy, so certified, to enable him to receive the taxes; or indeed any copy. Any individual may, if he please, pay to the

sheriff the amount of his taxes, and his receipt will be a sufficient discharge, and will be sufficient to charge the sureties of the sheriff, and make them answerable, because the citizen, by reference to the returns in the clerk's office, may see what amount of taxes is due from him; and the sheriff is the only person who can rightfully receive them.

On the third point, we think, the defence fails. The 1st section of the 43d chapter of the act of 1844, provides, "that in actions brought upon the official bonds of sheriffs, and other public officers, &c. when it may be necessary to prove any official default of any of the said officers, any receipt or acknowledgment of such officer, or any other matter or thing which, by law would be admissible, and competent, for, or toward proving the same, against such officer himself, shall, in like manner, be admissible and competent," against his sureties in any action, where they are defendants. It cannot be questioned, that the acknowledgment of the sheriff, Woodside, was admissible against him, and therefore it was equally competent against his sureties.

Per Curiam. Judgment reversed, and a *venire de novo* awarded.

WILSON READ vs. JOSIAH GRANBERRY.

Where in a lease for a fishery, it is stipulated that the lessor, as a consideration for the lease, shall be entitled to all the offal, the lessees may put up their fish *whole*, so as to leave no offal, there being no stipulation in the lease that the fish should be cut, and no general custom proved that the fish put up at such fisheries were usually cut.

Where the *meaning* of a word in a covenant is to be explained by a custom, the custom must be proved to be so general, that the parties to the contract must be presumed to have reference to it.

Nothing is offal at a fishery, which is fit for food, and is consumed or sold for that purpose.

Appeal from the Superior Court of Law of Perquimons County, at the Fall Term, 1846, his Honor Judge PEARSON presiding.

This is an action of covenant, contained in a lease, granted by the plaintiff, Read, to the defendant, Granberry, in the year 1837. Read leased to Granberry a Fishery, adjacent to his farm, on Chowan river, and Granberry covenanted as follows: "And I, the said Josiah Granberry, do for myself, my heirs, and assigns, promise and bind ourselves, that the said Wilson Read shall have and enjoy, for, and in consideration of the above named privileges, all the offal of said beach, &c." Two breaches were assigned as follows—*first*, that the defendant had not permitted the plaintiff to haul all the offal off the beach, and *secondly*, that the defendant had diminished the quantity of offal, by putting up in gross, without cutting and trimming, seven hundred barrels of herrings during the fishing season of 1845. Nixon was a partner with Granberry in the lease. On the part of the defendants it was insisted, that they had a right to put up as many herrings in gross, as they thought proper. To rebut this defence, the plaintiff contended, that in the

year 1837, when the covenant was executed and always before that time, the practice of the fisheries on the Albemarle sound, and its tribularies, where this fishery is situated, was to cut and trim all the herrings that were put up. In order to establish the existence of this custom, the plaintiff introduced two witnesses; by one, he proved, that, previous to 1837, such was the custom at two specified fisheries, on that sound, both when leased out and when worked by their owners; but in neither case was the witness able to testify, that, when leased, the herrings were cut and trimmed at those fisheries, under a covenant in the lease or under any general custom. He further stated, that there were many other fisheries on the Albemarle sound, but he had no knowledge of any such custom or practice at them. The other witness proved, that, previous to 1840, he had very little knowledge of the fishing business; that it was not until 1842, that the fishermen commenced putting up gross herrings, but it was admitted, that, before 1837, the fishermen did put up what are called roe-herrings for family use which were not cut or trimmed.

The defendants insisted that there was no such ambiguity in the lease, as to authorise the introduction of parol evidence of any usage or custom to explain it; and that there was no evidence of *any* usage or custom, that would give to the words of the lease, an artificial meaning; that the word *offal* had a precise and definite meaning, and that there was no evidence to authorise the jury to infer that it was used in the covenant in any other sense.

His Honor instructed the jury that the word "*offal*," used in this lease might be explained by evidence of the custom of cutting and trimming fish, that were caught at the fisheries on the Albemarle sound, at and before the date of the lease; that it was in evidence before them, that, at and before the date of the lease, it was the custom at the *large* fisheries on that sound for the fishermen

to cut and trim all the herrings they caught, except a few barrels of roe-herrings, *put* up for family use; that it was for them to say whether the evidence proved the custom, or whether the contract was not made in reference to such usage; if they did, they would find for the plaintiff.

There was a verdict for the plaintiff and from the judgment the defendant appealed.

Iredell, for the plaintiff.
A. Moore, for the defendant.

NASH, J. We think his Honor erred in his instructions. The word *offal*, if not in general a word of art, may be such in the relation, in which it is used in this particular business, and therefore, may admit of parol evidence to show, in what sense, according to the custom of fishing. it is used. But here there can be no pretence, that there was any evidence of a general custom among the fishermen, upon the subject. Two witnesses were examined to this point. The first stated, that for nine years before 1837, he had lived as an overseer upon a plantation, to which was attached a fishery, which was under lease during a portion of that time; and that both the lessee, and the owner, after the expiration of the lease, were in the habit, or custom, of cutting and trimming the herrings for market; and that the same custom existed in an adjoining fishery, but he expressly stated that he did not know, whether the lessees of those fisheries, cut and trimmed their herrings, "in conformity to an existing custom, or in execution of the terms of their lease." He further stated "that there were *many* other fisheries on the Albemarle sound, but that he had no acquaintance with any practice observed at them of cutting and trimming all the herrings caught at them." The other witness stated, "that, previous to the year 1840, he had *very little acquaintance*, with the fishing business, and that it was not

until 1842, that the fishermen began to put up fish in gross." Neither of these witnesses prove the existence of any general custom upon the subject. Out of the many fisheries on the Albemarle, the plaintiff has selected two, how near to the one leased by the defendant, is not stated, and asks to hold them bound by the course pursued at them. The second witness knows nothing of any custom of any kind previous to 1840. If the above evidence was properly received by the Court, it certainly was not such as would authorise the jury in finding the existence of any such general custom, as would control the plain and natural import of the words used in the lease. Nor is there any thing in the case to show, if such a custom did exist, that it was so general, that the parties in contracting this lease, must be presumed to have had reference to it. 3 *Pk. on Ev.* 1410 and 1412. *Heald* v. *Cooper*, 3 Greenleaf 32, cited there. What then is the natural meaning of the word *offal?* The best Lexicographers define it to be, " waste meat, carrion, refuse, that which is thrown away as of no value, or fit only for beasts." When used in a covenant of this kind, it must mean, that portion of the product of the seine, which is not used for food, and all the portion of *that* which is used for food, and which is taken from it, in preparing it for market, or merchantable fish, as by exposure, has become unfit for such use. Thus it often happens that many fish are caught, which are not fit for food; and, very often from the great abundance that are caught, many become spoilt; all these, as well as the cuttings and trimmings are *offal;* and these constituted what the defendants covenanted the plaintiff should enjoy. We consider nothing as *offal* at a fishery, which is fit for food, and is consumed or sold for that purpose. Have they been guilty of the first breach assigned in the plaintiff's declaration? We think not. Is the second breach sustained, by proof that in barrelling their fish whole, they have violated their contract? We see no restriction in

the covenant, as to the mode of preparing their fish for market. It is proved by the plaintiff, that, all the fish, caught previous to 1837, were not cut and trimmed, for many were barrelled as roe-herrings for family use. Herrings so put up are neither cut nor trimmed. They do not therefore furnish near so much offal, as those which are so prepared for market. What if the defendants, instead of putting up a few barrels of roe-herrings, had so prepared for market all that were fit for such purpose; would it have been a violation of his covenant, even though one half or two thirds of all he caught, were so prepared? Certainly not; and yet the profits of the plaintiff would, in that case, be as much diminished, as they are now, according to his complaint.

We are of opinion, that, under their lease, the defendants had a right to prepare their fish for market, in any way their own interest might dictate; and that in barrelling them in gross, they have not violated any right which the plaintiff has reserved to himself. The plaintiff might, if he had so chosen, have expressed in the covenant in what manner the fish should be prepared for market. They were his property, and the defendant could not have thrown them away unless the plaintiff had been guilty of unnecessary delay in removing them, nor have given them away, or sold them, or in any manner appropriated them to his own use.

Per Curiam. Judgment reversed, and a *venire de novo* awarded.

THOMAS ASHFORD *vs* JOHN ROBINSON.

In an action upon a guaranty in the following words: "This is to certify that I pass over the following notes to S. A. for value received, and I agree to make them good, should any of them not be so," (naming the notes); *Held*, that this was a guaranty, not only that the notes were good at the time they were passed, but that they would be good, when payment should be required in a reasonable time.

Even if this were a contract within the statute of frauds, *Rev. Stat.* c. 50, s. 10, it would not be requisite, that the written contract should set forth the particular consideration; but to this contract the statute does not apply. It is a debt of the defendant himself, arising upon a new and original consideration of loss to the plaintiff and benefit to the defendant by means of the contract between these parties.

Notwithstanding gross negligence in the holder, the guaranty will be continued or revived by a new promise, made with a full knowledge of the facts.

The contract of guaranty is not like that of indorsement in the strictness of their conditions to be observed, or in the consequence of their non-observance. A guarantor is not discharged simply by the negligence of the other party, but he must also shew a loss by it: if a particular loss, he is exonerated *pro tanto*: if no loss, he remains liable for the whole debt.

The cases of *Miller* v. *Irvine*, 1 Dev. & Bat. 103; *Cooper* v. *Chambers*, 4 Dev. 261, *Adcock* v. *Fleming*, 2 Dev. & Bat. 223, and *Smith* v. *Morgan*, 3 Dev. 511, cited and approved.

Appeal from the Superior Court of Law of Sampson County, at the Spring Term 1847, his Honor Judge BATTLE presiding.

This is an action upon a guaranty of the note of David Underwood, which the defendant passed to the plaintiff's intestate in part payment for his crop of cotton, and was tried on the general issue. The guaranty, is in these words:

"CLINTON, May 1st, 1840.

This is to certify, that I pass over the following notes to Street Ashford for value received, and I agree to make them good, should any of them not be so. One note of J. S. Chesnut for $136 05. One note on, &c. The above notes are made payable to me."

(Signed,) "JOHN ROBINSON."

It appeared upon the trial, that Ashford issued a writ against Underwood, in the name of the defendant, on the note in question, on the 4th of February, 1841, returnable to the County Court, on the third Monday of that month, and that it was not executed in consequence of Underwood's having gone out of the county on business. The plaintiff gave evidence, that an *alias* was issued, and that the defendant was about serving it, and was prevented by the present defendant, who told him not to do so, as Underwood was insolvent, and he, Robinson, would have to pay the debt, and did not wish to be put to any further costs.

Afterwards the plaintiff brought another suit against Underwood, and got judgment in November 1841, but was unable to levy the money, as all Underwood's property was sold under executions on the 15th of April, 1841, and he was afterwards insolvent. The defendants afterwards mentioned to the sheriff, that he made himself liable for the debt through ignorance, and he sent word to the plaintiff, that he would still pay it, if the plaintiff would take a certain claim on another person. The plaintiff declined doing so, and demanded the money from Robinson, who refused to pay it; and this action was brought in February 1843.

The counsel for the defendant contended, that, as the guaranty did not express the consideration on which it was given, it was void under the statute of frauds. But the Court held otherwise. He further insisted, that the defendant had only bound himself for the solvency of

Underwood, at the time the guaranty was given; and that, as he did not fail until nearly a year afterwards, this action would not lie. And also, that the defendant was, at all events, discharged for the want of due diligence of the plaintiff, and his intestate, in endeavoring to collect the money from Underwood.

The Court instructed the jury, that, by the proper construction of the contract, the defendant was bound to make good the notes, provided the plaintiff could not collect them by due diligence. The Court further stated to the jury, that the plaintiff had been guilty of laches in respect to Underwood's note, which would prevent a recovery from the defendant, unless they should find from the testimony, that he had waived his right to take advantage of it, and that, if they should believe the evidence, that he did so waive his right, and promise to pay the debt, the plaintiff ought to recover. Verdict and judgment for the plaintiff, and the defendant appealed.

Badger, for the plaintiff.
Strange, for the defendant.

Ruffin, C. J. If this were a contract, within the Act for the prevention of frauds, *Rev. Stat. ch.* 50, *sec.* 10, it would not be requisite that the written contract should set forth the particular consideration, but it is sufficient to aver and establish it, by proof *aliunde*. *Miller* v. *Irvine*, 1 Dev. & Bat. 103. But this is not a case within the Act Although, in one sense, it is a promise to answer the debt of another, yet it is not simply and merely that, but is, in another sense, the debt of the defendant himself, arising upon a new and original consideration of loss to the plaintiff, and benefit to the defendant, by means of the contract between these parties. To such promises the Act does not apply; and the defendant's oral engagement would have bound him. *Cooper* v. *Chambers*, 4 Dev. 261, *Adcock* v. *Fleming*, 2 Dev. & Bat. 223,

DeWolfe v. *Rabaud*, 1 Peters' R. 476, 3 Kent's Com. 122, 5th Edit.

The meaning of the guaranty cannot be doubted for a moment. It is said, that "not *be* so," restricts the guaranty to the solvency of the debtors at the time of the contract. But an agreement "*to make* a debt *good*, *should* it not *be* so," taken even literally, is not merely an engagement that it *is* good at the moment of speaking. The party is to answer, "*should* the debt not *be* good." When? Why, certainly, when payment shall be required in a reasonable time. The intention was, that if the money could not be collected from the debtor by due diligence, then the defendant should make the note good, that is, by paying the money himself.

Upon the other point, the Court may, perhaps, be unable to administer strict justice between the parties, by reason of the omission of the plaintiff to set forth, in his exception, the period, at which Underwood's note came to maturity; so that it might be seen, whether the plaintiff has discharged the defendant by his laches. Upon the supposition that he had, we do not, indeed, see any error in the opinion given by the Court, that, if the evidence were believed, he had waived the laches, and bound himself by his interference with the proceedings against Underwood, and his voluntary promise to pay the debt, without any further proceedings of the plaintiff. The defendant knew all the facts, when the note fell due, and was transferred, when the suit was brought, and the insolvency, at that time, of Underwood. It is a settled rule in respect to the undertaking of an endorser, that his promise, with a knowledge of the facts, binds him, though, but for the promise, he would be discharged by the laches of the holder. It is not seen that there can be a distinction in that respect between a liability upon an endorsement of a note and upon a guaranty of it by a separate instrument. In *Smith* v. *Morgan*, 3 Dev. 511, it seems to have been taken for granted, that a subsequent promise

to pay the debt would excuse previous laches. And the Supreme Court of Massachusetts has directly decided the point, that, notwithstanding gross negligence of the holder, the guaranty will be continued or revived by a new promise made with a full knowledge of the facts. *Sigourney* v. *Wetherell*, 6 Metcalf R. 553. The plaintiff was obliged to use the name of the defendant in suing Underwood, and it must be understood as a part of the contract, that he was at liberty to do so. By his orders to the sheriff then, not to serve the writ, the defendant, in truth, interfered with the rights of the plaintiff by a violation of his agreement, and laid a just ground for an unconditional promise from him, to pay the money.

But, for the reason before mentioned, if there were an error in the last point, the judgment could not be reversed for it; because, as the facts are stated, no laches can be inferred, and the real error in the case was in advising the jury, upon these facts, that there had been laches. The contract of guaranty is not like that of endorsement, in the strictness of the conditions to be observed, or in the consequences of their non-observance. Exact punctuality, in presenting the note for payment, and giving notice of its dishonor to an endorser, is indispensable to charge him, and he is not obliged to show, that he has incurred any loss by the want of it. But a guarantor is not discharged simply by negligence of the other party, but he must also show a loss by it: if a partial loss, then he is exonerated *pro tanto:* if it has produced no loss to him, he remains liable for the whole debt. Story on prom. notes, S. 400. Here the defendant says he sustained a loss by the neglect to sue Underwood before his insolvency in April 1841. But he does not shew, that the plaintiff could not have sued, so as to have put his execution on the debtor's property, before the sale of it; for the Court cannot assume that the note was due before February, 1841, or that the plaintiff had increased the defendant's risk by granting indulgence to the debtor, or that the

plaintiff could have done better to secure the defendant from loss, than by the suit, which the defendant stopped by his directions to the sheriff, and his engagement to pay the money, without any further pursuit of Underwood.

The whole foundation of the defence, therefore, failed.

PER CURIAM. Judgment affirmed.

HALL, McRAE & CO. vs. ROBERT W. WOODSIDE & AL.

Where, on a *sci. fa.* against bail, the pleas were, no *ca. sa.* issued, and payment, and the jury found all the issues in favor of the defendant, this Court will not enquire into the correctness of the charge of the Judge as to one of the pleas only, that of the validity of the *ca. sa.*

The cases of *Morrisey* v. *Bunting*, 1 Dev. 3, and *Bullock* v. *Bullock*, 3 Dev. 260, cited and approved.

Appeal from the Superior Court of Law of Brunswick County, at the Spring Term, 1847, his Honor Judge BATTLE presiding.

This was a *scire facias* against the sheriff of Brunswick County, as special bail for one David Treadwell, against whom the plaintiffs had recovered a judgment. The defendants pleaded *nul tiel record*, payment, statute of limitations, no *ca. sa.* issued, no *ca. sa.* returned. Much controversy existed, as to the sufficiency of the *ca.*

sa. The presiding Judge charged the jury that the *ca. sa.* produced was void, as not corresponding with the judgment; whereupon they returned a verdict in favor of the defendant, on *all* the issues; and from the judgment the plaintiffs appealed.

No counsel for the plaintiffs.
Strange, for the defendants.

NASH, J. Whatever error the Judge may have committed in the opinion he expressed as to the insufficiency of the *ca. sa.* produced in evidence, the Court cannot look into it. Among other defences, the defendant pleaded, that the debt recovered by the plaintiffs was paid; and the jury have found that plea to be true, as well as the others. This finding puts the construction on the *ca. sa.* out of the question. The cases of *Morrisey* v. *Bunting*, 1 Dev. 3, and *Bullock* v. *Bullock*, 3 Dev. 260, are direct authorities. And this we must especially hold, because it appears from the case that the debt was, in fact, paid. For the debt and costs amounted to the sum of $209 36, and upon a *fi. fa.* the sheriff returned the sale of a negro, for $307.

PER CURIAM. Judgment affirmed.

NOTE.—The cases of PATRICK MURPHY and ISAAC NORTHROP *against* the same defendants, depending upon the same principle, were determined in the same way at this Term.

JAMES BENNETT & AL. *vs.* GEORGE WILLIAMSON.

Where slaves are bequeathed, the statute of limitations, in behalf of one who has purchased them from a stranger and kept them in possession the requisite time, gives a title against the executors, and a subsequent assent by him to the legacy will not enable the legatees to sustain an action for the slaves at law.

The saving of infancy, in the statute of limitations, as to slaves is meant for one, who has an original cause of action at law.

The cases of *Bennett* v. *Williamson*, 1 Dev. & Bat. 282, *Earle* v. *McDowell*, 1 Dev. 16, *Collier* v. *Poe*, 1 Dev. Eq. 55, *Powell* v. *Powell*, 1 Dev. & Bat. Eq. 379, and *Green* v. *Harris*, 3 Ired. 210, cited and approved.

Appeal from the Superior Court of Law of Caswell County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

The plaintiffs are the children of Lucy Bennett; and the action is detinue for a slave, Sylvia, and several of her children. Pleas: *non detinet*, and statute of limitations.

The negro Sylvia formerly belonged to Emanuel Wicks, of Nottaway County in Virginia; and two or three years before his death he lent her to his daughter Lucy, then the wife of Walker Bennett, of the same County. Soon afterwards Walker Bennett removed to Caswell county in this State, and brought the slave, then a girl, with him. On the 15th of January, 1818, Emanuel Wicks made his will, and therein bequeathed as follows: "I give and bequeath unto the children of my daughter, Lucy Bennett, Sylvia and her sister Mary; all of which, with their future increase, I give to them and their heirs forever. It is my will, that Walker Bennett, shall not have the use or control over the negroes given as above to my daughter

Lucy's children; but if she survives him, then my daughter, Lucy, may have the use of the said negroes during her widowhood, and no longer." The testator died in 1819, and his will was proved and letters testamentary granted to the executors in February, 1820. Walker Bennett continued in possession of Sylvia in Caswell County until some time in the year 1821; and he then sold and conveyed her to the defendant, Williamson, who has since been in possession of her and her issue, as they were born, up to this time, claiming them as his own. Walker Bennett died in 1835, and Lucy Bennett in 1845. The youngest of the plaintiffs came to full age in 1839, and this action was brought in October 1846, after a demand. There was no evidence of an express assent of the executors to the legacy to the plaintiffs. On the part of the plaintiffs the depositions of the executors were taken in this cause: and they identify the plaintiffs as the children of Lucy Bennett, and also the woman Sylvia, now in the defendant's possession, as the negro given by the grandfather's will to the plaintiffs.

Upon the foregoing case the counsel for the plaintiffs insisted, that the jury might find, that the executors did not assent to the legacy until after the death of the mother, Lucy Bennett; and that, if the jury should so believe, the plaintiffs were entitled to recover. And the counsel moved the Court so to instruct the jury. The Court refused the motion, and instructed the jury, that the plaintiffs ought not to recover, whether the executors assented to the legacy or not, or whether such assent was given before or after the death of the mother of the plaintiffs. Verdict and judgment for the defendant; and the plaintiffs appealed.

E. G. Reade, for the plaintiffs.
Norwood and *Kerr*, for the defendant.

RUFFIN, C. J. If there was no assent of the executors, the plaintiffs, of course, have no title at law. To maintain their action, then, an assent at some time must be supposed; and it is admitted on the part of the plaintiffs, that the action is barred, if the assent be not shewn or presumed to have been given after the death of Mrs. Bennett in 1845. Now, nothing whatever is seen to fix that as the period of the assent. It is stated, that neither party gave direct evidence of an assent at any time. Why, then, should the particular period mentioned be assumed as the true one. It has already been decided upon this will, that the gift to the children was immediate and absolute, and that the mother was not intended to take any legal estate. *Bennett* v. *Williamson*, 1 Dev. & Bat. 282. There was no reason, therefore, arising out of the contingent provision for her, why the executors should retain the legal title or withhold their assent to the gift to the children, until their mother should die. It appears, indeed, plainly enough, upon the depositions of the executors, that they then considered and spoke of the negroes, as belonging to the plaintiffs under the will. But it appears as plainly, that they did not then so treat or consider them for the first time; but that they had always so regarded them, from the death of the testator; for they speak of Sylvia as having been then at Walker Bennett's, where the plaintiffs lived, and as belonging to the plaintiffs, and they give no intimation, that they ever took, or wished to take the negroes into possession or interfered with them for the purpose of paying the testator's debts or for any other purpose. Such a course of conduct by the executors for nearly twenty-seven years affords the highest evidence of an assent, and excludes an implication, that it was given in the last of those years rather than in the beginning, or when it was first ascertained that the executors did not need the negroes for the payment of debts, and left them in Bennett's possession

with his children. On this ground, therefore, the Court properly refused the instruction asked, and might have rested the case.

But, supposing the assent of the executors to have been given in 1845, and not before, the Court thinks, that even then the jury was correctly advised, that the plaintiffs ought not to recover. For the executors had lost their legal title before 1845, by the adverse possession of the defendant, and therefore their assent then could not vest a title in the plaintiffs. The saving of the statute of limitations, as to persons beyond the seas, does not include these executors, although they may have resided in Virginia and have never been in this State, *Earl* v. *McDowell*, 1 Dev. 16; and consequently, under the Act of 1820, *Rev. Stat. c.* 65, *s.* 18, an adverse possession by the defendant for twenty-four years gave him the title from them. To this it is objected, that infant legatees are thereby deprived of the benefit of the saving in their favour. But the saving of infancy is meant for one, who has an original cause of action at law. It does not extend to a legatee; for there is no occasion for it, since by his appointment the executor takes in the first instance, the personal estate, though specifically bequeathed, for the purpose not only of doing justice to creditors, but also for the further purpose of guarding the interest of the legatees, and, especially, of those under disability. The right of the legatee is not recognized at law until he gets the assent of the executor; but the legatee is like a *cestui que trust*, and is represented by the executor, who has the legal estate, as a trustee. The legal title of the legatee is derivative and comes to him through the executor; and, consequently, it never can arise after the title of his trustee, the executor, has been extinguished. It was further objected, that Walker Bennett came to the possession of the negroes as a bailee, and therefore that his possession could not become adverse to the bailor upon a mere claim of them as his own, *Collier* v. *Poe*, 1 Dev.

Eq. 55, and it was thence inferred, that the possession of the defendant, derived from Bennett, must be of the same character. But the inference is not a just one; for by the sale and purchase between Bennett and Williamson, there was an express conversion, and the latter took a new possession in his own right. *Powell* v. *Powell*, 1 Dev. and Bat. Eq. 379, *Green* v. *Harris*, 3 Ired. 210.

PER CURIAM. Judgment affirmed.

DAVID W. SANDERS *vs.* SAMUEL SMALLWOOD.

To avoid a plea of a discharge under the bankrupt law, the plaintiff must shew, not merely a mistake or omission in making the inventory on the petition of the bankrupt, but a fraudulent and wilful concealment.

Upon a case agreed, on such a plea, the Court cannot give a judgment for the plaintiff, unless the case states in terms a wilful concealment, or unless such wilful concealment *necessarily* results from the facts stated.

Where a marriage settlement had been made on a wife, and the husband afterwards obtained a certificate of bankruptcy and did not inventory the property so secured, and where it appeared also, that the marriage settlement had not been properly registered and was therefore void against creditors, but it did not appear that the husband knew of this defect in the registration, or, if he did, was aware of its operation in law, *held*, that he could not, by the Court, be declared to have been guilty of a fraudulent concealment in regard to such property.

Appeal from the Superior Court of Law of Onslow County, at the Spring Term, 1847, his Honor Judge PEARSON presiding.

Debt on a bond, and plea of a certificate of bankruptcy to the defendant as a voluntary bankrupt, granted by the District Court of the United States. The plaintiff replied, that, at the time the defendant exhibited his petition in bankruptcy, he was seised of a certain tract of land specified, and owned certain slaves also specified, and that he did not set forth the same as a part of his property in the petition, or any inventory annexed thereto, but fraudulently and wilfully concealed the same, and, by means of such fraudulent and wilful concealment of the said land and slaves, procured the said Court to declare him a bankrupt and decree him the certificate of his discharge.

Under these pleadings the parties drew up a case agreed, stating the following facts. Mary Boyd owned the land and negroes specified in the replication, and intermarried with Smallwood, the defendant, on the 17th of October 1835; but, before the marriage, by a deed of marriage settlement, made by and between herself, Smallwood, and George Boyd, she conveyed the land in fee, and the slaves to George Boyd as a trustee, in trust for herself until the marriage, and afterwards in trust to, and for her separate use, free and clear of any interest, control or power of the intended husband, and in trust to convey the same to any persons she might appoint in her life-time, or by her last will, as if she were sole, and in case she should fail to make an appointment of any part of the property, then in trust as to it for her next of kin. The deed was proved before the Clerk of the County Court, November 16th, 1835, and registered the same day. The defendant did not include in his inventory any part of the land or negroes mentioned in the deed, and omitted, failed, and neglected to set out, or disclose the same in any part of the proceedings in bankruptcy.

It was agreed between the parties, that if the Court should, upon these facts, think the plaintiff was entitled to recover, judgment should be entered for the principal

money mentioned in the bond, and interest; and if otherwise, then judgment for the defendant.

The Court was opinion with the defendant, and gave judgment accordingly, and the plaintiff appealed.

J. W. Bryan, for the plaintiff.

The plea of the defendant, of his discharge in bankruptcy simply, is insufficient and ineffectual to bar the recovery of the plaintiff.

1. There is no averment in the plea, that the debt due the plaintiff was proveable under the bankrupt act, and without such averment, the discharge does not appear to be a bar to the action.

2. There is no averment that this debt was not created, in consequence of the defalcation of the defendant as a public officer, or while he was acting in a fiduciary capacity.

The Federal Courts are agreed, that fiduciary debts are not discharged by the certificate, unless the creditor comes in and proves the debt. The plea should have shewn that this was a debt on which the discharge might operate. *Sackett* v. *Andross*, 5 Hill's (N. Y.) Reps. 327.

As a voluntary bankrupt, the defendant was required to present with his petition, an accurate inventory, *of his property, rights, and credits, and the location, and situation, of each and every parcel, and portion thereof.* And he was afterwards subject to examination on oath, before the Court, or a commissioner in relation among other things, to his property and rights of property. His omission to insert this property in his inventory was a fraud upon his creditors and the bankrupt act, *Brereton* v. *Hull*, 1 Denio's (N. Y.) Reps. 75. It was not for the plaintiff to shew that "the defendant knew or had any reason to believe that the marriage settlement had not been proven and registered as required by law." This was a fact peculiarly within the knowledge of the defendant—he was a party to the deed, and interested therein, and

moreover, if it were not proved and registered according to the directions of the act, it was void as to *his* creditors, *Smith* v. *Garey*, 2 Dev. and Bat. Eq. R. 42. The *law* presumes that the defendant knew that the deed had not been proven and registered as required by law, and the legal effect of the same, and he cannot allege his ignorance of the same; for a neglect to acquire a knowledge of the laws which have been promulgated is voluntary ignorance. *Doct. and Stu. I*, 46. *Plowd.* 343. The statute, which was known to the defendant, required certain formalities which had not been complied with, which were essentially requisite to give validity to the deed; and the registration of the same under the *fiat* of the clerk, was an unauthorized act, and is not even notice, *Smith* v. *Castrix*, 5 Ired. R. 518. The omission and failure to insert the property in his schedule was in law a wilful and frudulent concealment, within the meaning of the act of Congress, for it counteracted the policy of the bankrupt act. The defendant knew that the deed of marriage settlement, thus proven and registered, did not convey the property therein mentioned to the trustee as against his creditors; it therefore became requisite before he could be legally entitled to be declared a bankrupt, that he should set forth his property rights and credits of *every name, kind and description and the location and situation* of each and every parcel thereof, verified by oath, in his inventory, according to the bankrupt act of 1841, s. 1; so that the same might be taken possession of by the assignee in bankruptcy, and become vested in him for the benefit of his creditors, according to the third section of said act. *Adams* v. *Alexander*, 1 Ired. R. 401. Mr. Justice THOMPSON, in the case of *Wakeman* v. *Hoyt*, reported in the Law Reporter 309, in commenting upon that clause in the first section of the bankrupt act, which declares wherever such person, "shall willingly or fraudulently procure himself to be arrested, or his goods and chattels distrained," &c. says, "Willingly or

fraudulently" is the language of the act. The debt secured by the attachment or execution may be *bona fide* and justly due. Nevertheless, if the debtor so willingly procures himself to be attached or his property to be taken in execution, it is an act of bankruptcy. What is there in such a transaction that partakes of fraud? Nothing if it is an honest debt. All that the debtor does is to procure the execution to be levied on his goods, &c. Why is this an act of bankruptcy? It can be for this reason only, that he thereby does an act contrary to the policy of the bankrupt law. That policy is, in cases of hopeless insolvency, to cause an equal distribution of the trader's effects. It is on no other principle that it is made an act of bankruptcy, for a trader to aid a creditor in securing his debt, by attachment or execution. Then if that be so, how does it differ from the act of bankruptcy last specified in making a "fraudulent conveyance, assignment," &c. Does the word "fraudulent" there used necessarily import moral turpitude? or may it be satisfied with a fraud in law, counteracting the policy of this act, and preventing a general distribution of his property among the creditors of the bankrupt, by applying it exclusively to the benefit of such of them, as he may choose to prefer? Whether such preference is given to two or more, is wholly immaterial. It equally counteracts the policy of the law. If we look to the second section, it appears to me that it serves to explain what shall be deemed the kind of *fraud* which may render a conveyance fraudulent, within the meaning of the first section. All future payments, securities, conveyances, &c. shall be deemed *utterly void*, and a *fraud upon this act.* It is precisely as honest an act for the debtor to procure an attachment or execution to be levied on his property by a creditor, as it is to secure to him a preference by means of a conveyance. It is *fraudulent* only because it counteracts the policyof the law; and this is equally true in the one

case as in the other. If the defendant therefore knew that the marriage settlement was not proven and registered according to law, or he was bound by law to know it, then an omission to insert the property in his inventory deprived his creditors in bankruptcy of the benefit of it and was a fraud upon the bankrupt act. But he in fact knew it. Else how could he *omit and fail to do it?* The very terms used, imply a previous knowledge, and it is upon that principle, that acts of omission and commission are made criminal by law, and so too we are taught in the revealed law. In the matter of *Nicholas G. Norcross* before Judge WARE, in the District Court of the United States, Maine, Law Rep. Vol 5, 124, it was objected that the petitioner had omitted to set forth all his property, &c. in his schedule, and the objection was sustained and the proceedings declared to be defective; and subsequently the petitioner was permitted to amend his schedule. In this case no amendment can be made, for not only are the proceedings in bankruptcy with regard to the same, finally closed and adjudicated and the assignee discharged from the same, but the bankrupt act itself is repealed and that too in a way restrictive of the rights of creditors in all adjudicated cases, so far as this remedy is concerned. If therefore, the plaintiff has no remedy in this case, he is entirely remediless.

Stanly and *Rodman*, for the defendant.

RUFFIN, C. J. The deed was not properly proved before the Clerk, and, not being duly proved according to the directions of the Act, it was void, as against the husband's creditors. *Sanders* v. *Ferrill*, 1 Ired. 97. *Smith* v. *Garey*, 2 Dev. & Bat. Eq. 42. But, admitting the property to have been in the defendant for the benefit of his creditors, it is not the necessary consequence, that his certificate of bankruptcy can be impeached and avoided, for the omission to insert that property in his inventory, or

otherwise disclose it to the Court sitting in bankruptcy. For such omission may have been innocent, as the defendant might not have been aware of the legal insufficiency of the probate, or, indeed, might not have known how, in point of fact, the deed was proved; and the Act of Congress does not invalidate the discharge for every omission of property, but only "for some fraud or wilful concealment of property, contrary to the provisions of this Act." As the previous parts of the Act require the party to file with his petition, "an accurate inventory of his property, rights, and credits, of every name, kind, and description, and the location and situation of each and every parcel and portion thereof," it could hardly be expected, that any discharge would stand, if the mere failure to give in some one article of property, however inconsiderable, and though unknown to the bankrupt, would invalidate it; for no person, or very few indeed can furnish such inventory, including by accurate description *every* parcel or portion of his property or rights. Therefore, although it is made his duty to give such an inventory upon his oath, and he ought to come as nigh the exact truth as he can, yet a mistake or omission in making the inventory is not to affect the certificate, but only a fraudulent and wilful concealment. The certificate is avoided by the Act, as a punishment for the dishonesty of the applicant, and that is solely the policy of the provision. For the insertion or the omission of property in the inventory is of no consequence to the rights of the assignee or creditors, except as it may promote the convenience or inconvenience of getting it in, and disposing of it; since the bankrupt Act, unlike our insolvent Act, vests in the assignee all the property, and rights of property, of every name, and nature, and whether real, personal, or mixed," and not merely that which is inserted in the schedule. It is plain, therefore, that the terms "wilful concealment," mean, in this act, a fraudulent and dishonest attempt to withdraw from the use of his creditors property, which the bank-

rupt knew they were entitled to have, and that, to that end, he corruptly and knowingly omitted to disclose it. The replication, in this case, puts the point on the *quo animo*, and does so correctly; and, therefore it was incumbent on the plaintiff to establish the bad purpose imputed to the defendant. That is properly an enquiry for a jury; and it is not perceived how the Court could give a judgment for the plaintiff upon a case agreed, in which the wilful concealment was not stated in terms, or did not *necessarily* result from other facts stated. *Prima facie*, there is a presumption in favour of innocence. But in the present case the fraud of the defendant is not directly admitted, nor can it be reasonably inferred; but on the contrary, the honesty of his error and omission is hardly to be questioned. It was not his part to have the custody of the deed, nor to have it proved, nor to take any control over the property; nor does it appear, that he had any reason to believe that the deed was not properly proved, and registered, or that he ever set up any claim to any part of the property. Although, then, the property itself may be subject to the claim of his creditors through the assignee, yet the defendant himself and his subsequent acquisitions are protected from prior debts.

Per Curiam. Judgment affirmed.

DEN ON DEMISE OF NANCY FOLK & AL. *vs.* WILLIAM R. WHITLEY.

A. in 1791, devised as follows, "I lend unto B. W. all the lands I own in Conehoe Island, &c. during his natural life, and after his death I give the above mentioned land to his heirs lawfully begotten, to them and their heirs forever; and in case he should die without lawful issue of his body, then I lend the above mentioned land to his brother H. W. &c."

Held, that the words here used "heirs lawfully begotten," were words of limitation and not of purchase; that B. W. therefore took an estate tail, which by the Act of 1784, was converted into a fee simple, and that the remainder over was void.

Held, also, that the words "to them and their heirs," superadded to the words "his heirs lawfully begotten," did not affect this construction of the devise.

Appeal from the Superior Court of Law of Martin County, at the Spring Term, 1847, his Honor Judge BAILEY presiding.

Both parties claim the premises under the will of Benjamin Whitley, the elder. It was executed on the 10th of July, 1791; and thereby the testator devised as follows:

"I lend to Henry Whitley, son of Elizabeth Nobles, a parcel of land, &c. during his natural life, and after his death, I give the aforesaid land to his heirs lawfully begotten of his body, to them and their heirs forever; and, in case the said Henry should die without issue lawfully begotten, I lend the said lands and plantation to his brother Benjamin Whitley, in the same manner as before mentioned, to him."

"Item: I lend unto Benjamin Whitley, son of Elizabeth Nobles, all the lands I own in Conehoe Island, &c." (being the premises now in controversy) "during his natural

life, and after his death I give the above mentioned land to his heirs lawfully begotten, to them and their heirs forever; and in case he should die without lawful issue of his body, then I lend the above mentioned land to his brother Henry Whitley, in manner as aforesaid."

By other clauses the testator lent land to Mary Whitley, "during her natural life, and in case the said Mary should die without lawful issue begotten of her body, that then the said land, lent to her, to return to her sister Lydia Whitley, in manner as aforesaid, to her heirs lawfully begotten of her body, to them and theirs forever;" and also lent land to Lydia Whitley, "and in case the said Lydia should die without lawful issue begotten of her body my desire is, that the whole of the land lent to her to return to Mary Whitley, her sister, in the same manner as aforesaid; and if Mary Whitley and Lydia each should die, without heirs lawfully begotten of their body, then the land before lent to them to return to Henry and Benjamin Whitley, in the same manner as the lands before lent to them, to their heirs lawfully begotten of their body, to them and their heirs forever."

There are then the following dispositions, "I lend Nancy W. Brooker a tract of land, &c.; and my will is, if the said Nancy should have lawful issue of her body, the land to be theirs and their heirs forever; and in case she should die without issue I give the said land to Henry Whitley, to him and his heirs forever. I lend to my brother John all my land on the north side of Conehoe creek during his life and at his death to be at his disposal. My will is that four acres of land I brought from, &c. be sold and the money given to my son Henry Whitley. Whereas I purchased a piece of land from W. Piner and he refuses make a title; my desire is that my executors bring suit for the land, and, if recovered, to be equally divided between Henry Whitley and Benjamin Whitley, to them and their heirs forever."

The testator then directs four young negroes to be purchased; and he gives one of them to Henry Whitley, "the value of which to be taken out of his part of my estate;" and that his working tools, hands, and horses, to be kept for the purpose of cultivating his lands, and that Elizabeth Nobles and her children Henry, Benjamin, Mary and Lydia Whitley have a sufficient support therefrom, until Benjamin arrive at 21. He also lends Elizabeth Nobles a negro man, Mose, during her life; and he gives to her and to each of her said children, and to Mary W. Brooker, Fanny Brooker and Lydia Deacon, by distinct clauses, several legacies of specific chattels, such as horses, cattle, beds, and furniture.

Then came the following clauses: "Whereas the many legacies that I have lent already out, my desire is, that if either of the parties should die without issue lawfully begotten of their body to the survivor or survisors of the living parties equally to be divided in manner aforesaid, to them and their heirs forever:"

"It is my will and desire that all the rest and residue of my estate that I have not before given or lent be equally divided between Elizabeth Nobles' four children, Henry, Mary, Lydia, and Benjamin, when my son Benjamin shall attain to 21 years."

Benjamin Whitley, the younger, entered into the lands devised to him and continued in possession of them until his death, which happened in 1846; and after that event the defendant entered, claiming the premises under the said devise to him, or as being the heirs of his body lawfully begotten. They were the children of one Milly Brewer, born out of wedlock; and the said Benjamin, the younger, was their reputed father and intermarried with their mother in 1822, but had no issue afterwards. In 1823, he procured a Private Act of Assembly to be passed, to legitimate the defendants as his children and heirs; and in 1839, upon his petition filed for that pur-

pose in the Superior Court of Martin and due proof, they were declared legitimate by that Court.

Henry Whitley died in 1843 and the lessors of the plaintiff are his children and heirs at law, and claiming as such they brought this suit in February 1847.

The case was submitted to the Superior Court on the foregoing facts, stated in a case agreed; and, the Court being of opinion for the defendant, judgment was entered for him, and the plaintiffs appealed.

No counsel for the plaintiffs.
No counsel for the defendant.

RUFFIN, C. J. It is not necessary to consider the effect of the statute and decree of legitimation, nor whether the defendants could under them be regarded as answering the description of the heirs of Benjamin Whitley, lawfully begotten of his body, supposing them to take as purchasers; because the Court is of opinion, that those are not words of purchase, but of limitation, by force of which, under the act of 1784, Benjamin Whitley the younger, took an estate in fee, and therefore the limitation over, under which the lessors of the plaintiffs claim, is void. Undoubtedly a devise to one for life, remainder to the heirs of his body, is a proper estate tail, according to the rule of law, called the rule in Shelley's case. It is precisely the same, as a devise to one and the heirs of his body. That is the devise here, except that to the words "heirs of his body lawfully begotten," are superadded the words of limitation "and their heirs;" and we believe it is perfectly settled, that, unless such superadded words of limitation change the course of descent into another line or channel, they do not operate, so as to convert the first words of limitation into words of purchase. In *Shelley's case* itself, 1 Rep. 93, there were such superadded words of limitation. It was a recovery suffered by Edward Shelley, a tenant in tail, to the use

of himself for life, remainder to another for 24 years, and then to the use of "the heirs male of the body of the said Edward lawfully begotten and of the heirs male of the body of such heirs male lawfully begotten," and then over. He had two sons, of whom the elder was dead, leaving his wife *enceint* of a son; but, before he was born, Edward died and his younger son entered; and the question was, whether the elder brother's son, when born, had not the better right. It was held, he had, as the heir of the body of his grand father by descent, and not by purchase. There are many other cases to the same effect. *Wright* v. *Pearson*, 1 Edm. 119, and stated and commented on by *Mr. Fearne*, Cont. Rem. 126, was a devise to T. R. for life, remainder to trustees to preserve contingent remainders, remainders to the heirs male of the body of T. R. lawfully to be begotten "and their heirs;" provided that in case T. R. die without leaving issue male, then over; and it was held T. R. took an estate tail. The terms of that Will are much like those now before us, except that in *Wright* v. *Pearson*, trustees to support contingent remainders were interposed; but that, Lord Keeper HENLEY said, was a distinction without a difference, and therefore did not rely on that circumstance. In the more modern case of *Measure* v. *Gee*, 5 Barn. and Ald. 910, there was the same circumstance of a remainder to such trustees, and it did not affect the construction of the devise: which was to T. for life, remainder to trustees to support contingent remainders, "and after the death of T. to the heirs of the body of the said T. his, her, or their heirs and assigns forever; but in case there should be a failure of the issue of T." then over, upon which it was held, that T. took an estate tail. Besides those, there are the accordant cases of *Goodright* v. *Pullyn*, 2 Ld. Raym. 1436, and *Den* v. *Shenton*, Cowp. 410; which are both strong, and particularly the former; where the devise was to A. for life, and after his decease

unto the heirs male of the body of A. and his heirs forever; but if A. should happen to die without such heir male, then over; and it was held to be an estate tail in A. and that the words "*his* heirs for default of such *heir* male," engrafted on "heirs male of the body of A." did not qualify them so as to prevent the operation of the general rule. It is clear, therefore, that Benjamin, the son, took an estate tail by the words of the devise to him, and, consequently, that the limitation over to Henry was after an indefinite failure of the issue of Benjamin. The effect, then, is, that the fee into which the Act of 1784 turns the estate tail, became absolute in Benjamin, and Henry and his heirs take nothing.

It was argued, however, for the plaintiff, that the subsequent general clause changed the character of the limitation over in that respect, by confining the time to the lives of the children by force of the words "survivors or survivor." It is difficult to understand the clause referred to or apply it to any purpose. But, at all events, it seems impossible to say, that it was thereby intended to qualify the previous devises of particular lands to one child with a limitation over to another one, by converting the limitation into one to all the children, or to the "survivors or survivor of the living parties," to whom any gift was made. That provision must be referred to those dispositions in the will, to which no special limitation over was annexed. But, however that may be, it is clear that lessors of the plaintiff are not within the clause in question; for the "survivors or survivor" necessarily means some or one of the donees, who were living at the making of the will. The words are, "if either of the *parties* should die without issue, to the survivors or survivor" of *the living parties*; so as to make the limitation over, under this clause, contingent upon the event of survivorship. Now, Henry Whitley, under whom, as his heirs, the lessors of the plaintiff claim, died before Ben-

jamin, and, of course, nothing could vest in him, or descend to his heirs under that clause.

PER CURIAM. Judgment affirmed.

THE STATE TO THE USE OF SAMUEL McINTOSH *vs.* JOHN G. BETHUNE & AL.

As a certificate of bankruptcy may be pleaded in all Courts, it may be impeached for fraud in any Court, in which it may be set up as a bar.

Where a son, being insolvent, conveyed property to his father for an apparently valuable consideration, and was permitted to remain in the continued possession and exercise of ownership over it for a number of years, a presumption of fraud is raised, either that the conveyance, though absolute upon its face, was not *bona fide* for the benefit of the father, but upon some secret trust for the insolvent vendor or donor; or, at the least, that there was intention to give the son a false credit. The presumption is not a conclusive legal one establishing the fraud, but must be submitted to a jury.

It is not every omission of property in the schedule of a bankrupt, that invalidates the decree of discharge, but only a fraudulent conveyance or wilful concealment of it.

The case of *Carter* v. *Rubland*, 1 Hay. 97, cited and approved.

Appeal from the Superior Court of Law of Moore County, at the Fall Term, 1847, his Honor, Judge CALDWELL presiding.

This is a *scire facias* to revive a judgment. The defendant McNeill pleaded a certificate of bankruptcy granted on his application by the District Court of the

United States for this District. Replication, that the said defendant had fraudulently conveyed to certain persons his lands, goods, and credits, with intent to hinder the relator and his other creditors of their debts, and that he did not make a true and accurate inventory of his property, rights, and credits, in his petition, but was guilty of the fraudulent and wilful concealment thereof; and it then specifies sundry tracts of land and chattels which the defendant then owned, and did not include in his inventory, and wilfully concealed, and had before that time conveyed with the intent to defraud the relator. Rejoinder, and issue.

The original judgment was rendered in August 1838, in a suit commenced in November 1836. The petition in bankruptcy was filed in July, and the certificate granted in October 1842. On the part of the plaintiff, evidence was given, that in February 1838, the defendant conveyed to his father three tracts of land, and a wagon, four horses, and gear; and that no part of that property was included in the defendant's inventory. Evidence was farther given on the part of the plaintiff, tending to shew that the conveyance to the father was made without any valuable consideration, or if for any, for an inadequate one; and that the defendant continued in the possession and enjoyment of all the land, the wagon, horses and gear, up to the time of the trial in August 1847, using them as his own. On the part of the defendant, evidence was then given, tending to shew that the conveyance from him to his father was founded upon a real sale for a fair price. Evidence was further given on the part of the defendant, that in the year 1840, the lands, which he had conveyed to his father, were sold under a *fieri facias* against the defendant's property, and were purchased by one Morrison; who, however, had never taken a deed, or possession.

Upon that evidence, the counsel for the defendant insisted, that the conveyance to the defendant's father was

made in good faith and upon a sale for an adequate valuable consideration; and, further, that the sheriff's sale to Morrison divested any title that might then have been in the defendant, or, at least, excused him for not including the property in his schedule; and, finally, that the certificate of bankruptcy was a conclusive discharge from this debt. Upon these points, the Court instructed the jury, that the certificate of bankruptcy was not conclusive, but might be impeached in this suit for fraud in the defendant's conveying his property without a valuable consideration, and to hinder his creditors, and wilfully concealing the same in the proceedings in bankruptcy; that if the defendant retained the possession and enjoyment of the property after he had conveyed it to his father, as deposed to by the witnesses, it raised a presumption, that the conveyance was fraudulent; but such presumption would be repelled, if the jury believed, that the conveyance was executed *bona fide*, and for the considerations stated by the witnesses on the part of the defendant. And lastly, that the purchase of Morrison did not divest the title of the defendant, if he had any; and that the case was not affected by that transaction.

The jury found, that the conveyance from the defendant to his father was made to defraud the defendant's creditors, and that the defendant did not make a full and fair surrender of his property and estate in his schedule, but wilfully and fraudulently concealed parts thereof, to-wit, the land, the wagon, horses and gear, that had been so conveyed to his father, and, by means thereof, fraudulently obtained the certificate of bankruptcy. Judgment was rendered thereon for the plaintiff, and the defendant appealed.

No counsel in this Court for the plaintiff.

Strange, with whom was *Kelly*, argued,

That it was error to charge, that fraud is to be presumed from possession; that possesion after a sale of pro-

perty is a mere badge or circumstance of fraud, and creates no presumption, especially in a case where the possession of his certificate raises a presumption in favor of the bankrupt.

That a sale of land under an execution divests the title out of the defendant in execution even before the purchaser takes his deed. *Davidson* v. *Frew*, 3 Dev. 1.

That even if it did not, that fact should have been left to the jury as a matter of excuse, and to shew that the concealment was not wilful. *Stark. Ev.* 307.

Ruffin, C. J. The instruction, respecting the operation of the decree and certificate of bankruptcy, is sustained by the express provisions of the Act of Congress of August 19th 1841. The first section provides for both a voluntary application of all debtors to be declared bankrupts, and for an application by creditors of certain classes of debtors, to have them so declared. In a case of the latter kind, it is, contrary to the rule in England, enacted in the close of the section, that the decree passed by the Court, as therein directed, "shall be deemed final and conclusive, as to the subject matter thereof." But the provision is different as to a case of the former kind. Though it may be in the power of Congress to discharge insolvents from their debts, at their own instance, it was, we believe, a new principle in the law of bankruptcy, and so strongly tends to encourage men dishonestly to contract debts, which they do not expect, nor mean to pay; as to make it highly proper, as far as possible, to guard the Courts from imposition, and protect creditors from fraud in obtaining a discharge. It is enough, to put it in the power of a man, after running in debt, to spend all his property, and then upon his own motion, and upon his own oath, free himself, and his future acquisitions, from liability to his creditors. The law should therefore see, at least, that the party had no property, or that he had freely surrendered all that ought to go towards the sat-

isfaction of his debts. It is a just and fitting requital to one, who attempts to get a discharge by denying that he owns property, when in fact he does, or by purposely concealing any part of what he does own, to refuse him, in the first place, the discharge upon any terms, and, in the next place, to hold a discharge, obtained by such means ineffectual and void, whenever the fraud shall appear. Accordingly, the Act of Congress contains several provisions, intended to counteract the mischiefs, that might arise from this new principle. The first section requires the debtor to set forth in his petition, "an accurate inventory of his property, rights, and credits of every name, kind and description, and the location and situation of each and every parcel and portion thereof." The fourth section enacts, "that every bankrupt, who shall *bona fide* surrender all his property" (with certain exceptions, not material here) "for the benefit of his creditors, and shall comply with the orders of the Court, shall be entitled to a full discharge from all his debts, to be decreed and allowed by the Court which has declared him a bankrupt, and a certificate thereof granted to him by such Court accordingly, upon his petition filed for that purpose. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property or rights of property, or shall have preferred any of his creditors, contrary, &c. he shall not be entitled to any such discharge or certificate." Thus far the Act provides only for the grant or the refusal of the certificate by the Court of the United States, proceeding in bankruptcy. One who has been guilty of fraud, or the wilful concealment of property, "shall not be entitled to a discharge or certificate." The bar to the discharge is not temporary, or until the debtor shall supply the omission in his inventory, or make a further and full disclosure; but it is peremptory and perpetual, at least, in respect of that application, as a penalty for the attempt to commit a fraud on the Act, by a fraudulent conveyance, or wilful conceal-

ment of property. But that is not all. For, the Legislature was aware that such dishonest practices might escape the vigilance of the most cautious Judge, and iftended, if they should, that notwithstanding the success in his application, the dishonest party should not permanently have the immunities meant for honest insolvents; and therefore, it was provided further, that such discharge and certificate, when duly granted, shall, in all Courts of Justice, be deemed a full and complete discharge of all debts, &c. and may be pleaded as a full and complete bar to all suits brought in any Court of judicature whatever, and the same shall be conclusive evidence of itself in favour of such bankrupt, *unless the same shall be impeached* for some fraud or wilful concealment by him, of his property or rights of property as aforesaid, contrary to the provisions of this Act, on prior reasonable notice, specifying in writing such fraud or concealment." The remedy of the creditor is not, therefore, an application to the Court of bankruptcy, upon the ground of fraud newly discovered: but it is by replying the fraud of the bankrupt to his plea of the certificate, so as thereby to avoid the bar. As the certificate may be pleaded in all Courts, it follows that it may be impeached in any Court, it which it may be set up as a bar. There was, therefore, no error in this part of the instructions to the jury.

The Court concurs also in the opinion with respect to the inference to be drawn from the continued possession and use by the defendant, of the property he conveyed to his father. The whole was conveyed at once, and the personalty consisted of the perishable articles of a wagon and team. There was a conflict of testimony as to the consideration and purposes of the conveyance, whether there was an adequate, or even any valuable consideration, or not. In that state of facts, and when it appears that the defendant was, at the time, indebted in sums which remain unpaid to this day, and which, the defen-

dant says, he is unable to pay, a continued possession and exercise of ownership, for upwards of nine years, over all the property conveyed to his father, and, as far as appears, without any act or claim of ownership by the father, do surely raise a presumption of a fraud; that is to say, either that the conveyance, though absolute upon its face was not *bona fide* for the benefit of the father, but upon some secret trust for the insolvent vendor or donor; or, at the least, that there was an intention to give the son a false credit upon his continuing apparent ownership of the property. The presumption is not, indeed, a peremptory and conclusive legal one, establishing *per se* the fraud. But, in the language of his Honor, those facts "raised *a* presumption," that the conveyance was fraudulent; which, however, would be repelled, if upon the whole evidence, including the continued possession and enjoyment of the property, the jury thought, that the conveyance was executed for an adequate valuable consideration and *bona fide*. Formerly, indeed, it was held, that the continued possession of personal chattels by a vendor, after an absolute conveyance, was *per se* fraudulent in law—so strong was the presumption then supposed to be. It is true, *Edwards* v. *Harben*, and that class of cases have not been sustained in their whole extent for many years past. Yet, they are not so far departed from, as to authorise the Court to say, that such continued possession and enjoyment do not create a presumption of covin, either by way of a secret trust, or the giving of false credit. On the contrary, the ground, on which such facts are allowed to go to the jury, is, that a presumption of fraud, does arise from them; though it may, or may not be, sufficient to authorise the finding of the fraud, as it may be fortified or impaired by other evidence. Indeed, in the present case, the presumption of a fraud was cogent, considering the relation of the parties, and the duration of the enjoyment; for a possession, derived from a

father, of the wagon and team, and continued so long, is, by presumption of law, a gift, unless the contrary be clearly proved; and a principal ground for that rule is the security of the son's creditors. *Carter* v. *Rutland*, 1 Hay. 97.

The purchase of Morrison, without taking a deed, did not divest the defendant's title to the land. Yet, it is not every omission of property in the schedule that invalidates the decree of discharge, but only a fraudulent conveyance or wilful concealment of it. It might have been an honest mistake in the defendant, in supposing that he ought not to inventory the land which Morrison had purchased. On the other hand, the delay of the purchaser for seven years, to take a deed from the sheriff, and the enjoyment during that period, by the defendant, afford reasonable grounds for suspecting the fairness of the purchase, and that some interest remained with the defendant. It was, therefore, as we think, a proper point to be left to the jury, whether the defendant had not some interest in the land, and wilfully concealed it; and, if the case depended on that point, the Court would feel obliged to award a *venire de novo*. But the point in respect to that land became immaterial, by the finding of the jury, as to the wagon, horses, and gear; for, although the defendant may have innocently omitted his naked legal title to the land, if it was purchased *bona fide* by Morrison, yet that did not excuse the omission of the chattels, which Morrison did not buy, but which belonged to the defendant for the purposes of his creditors, and, as the jury found, were wilfully concealed by him. Such concealment of those articles as effectually excludes the party from the benefit of the certificate, as if he had also fraudulently concealed the land; and, therefore, the presiding Judge was right, as it turned out, in saying that Morrison's purchase of the land, did not affect the case; and the judgment must be affirmed.

Per Curiam. Judgment affirmed.

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BOAZ ADAMS *vs.* JAMES C. TURRENTINE.

An action of debt will lie against a sheriff under our Statute for a negligent escape of a prisoner confined for debt, even though there was no actual negligence.

There are only two kinds of escape, known to our law, of a prisoner confined for debt; one voluntary and the other negligent, except where the prisoner has escaped by the Act of God or of the enemies of our Country.

The only difference, as to the liability of the officer, between the two kinds of escape, is, that, in the case of voluntary escape, he is liable absolutely; in the case of negligent escape, he has a right to retake the prisoner, and, if he does retake him upon fresh pursuit, he is not liable to an action of debt brought after such re-caption, and when he has the prisoner in custody.

The meaning of the term "negligent escape" in our Statute is the same, that was given to that term at the common law.

It is a rule for the construction of Statutes, that, when they make use of words and phrases of a definite and well known sense in the law, they are to be received and expounded in the same sense in the statute.

The cases of *State* v. *Jernigan*, 3 Mur. 12, and *Rainey* v. *Demming*, 2 Mur. 386, cited and approved.

Appeal from the Superior Court of Law of Orange County, at the Special Term, on the second Monday of December 1847, his Honor Judge BATTLE presiding.

This action is debt against the sheriff of Orange for the negligent escape of Mordecai Flemming, committed to the defendant in execution. Plea, *nil debet*, and issue thereon. The plaintiff obtained judgment against Flemming in Orange County Court, and afterwards, at November term, 1839, the bail brought him into Court, and surrendered him, and on the motion of the plaintiff, he was committed in execution, and was received by the defendant, who was then sheriff of Orange and confined him in the gaol

of the County until the 1st day of November, 1844, when the debtor escaped. It was admitted by the parties, that, during the whole period of Flemming's detention, and when he escaped, the defendant was the sheriff of Orange; that the gaol was new, well constructed, and strong; and that, when the prisoner escaped, the doors of the gaol were locked, and that he made his escape by cutting asunder two iron bars of the grating of a window of the debtor's room, and thereby made an opening, through which he passed; that there was no apartment in the prison for a gaoler's residence; and that the escape took place in the night time, and without the knowledge or consent of the defendant; and that, from the form of the window, the position of the grating, and the manner in which the bars were sawed, it appeared that Flemming was assisted to escape by some person on the outside of the prison.

Upon the foregoing facts, the counsel for the plaintiff contended, that he was entitled to recover, because the defendant was bound to keep the debtor safely, and that nothing would excuse him for not doing so, but the act of God, or of the enemies of the country. On the other hand, the counsel for the defendant insisted, that, upon a proper construction of the Act of Assembly, the defendant was not responsible in this action, as the debtor escaped without any actual negligence of the defendant, or his gaolers. Of this latter opinion was the presiding Judge; and he so instructed the jury, who found, accordingly, for the defendant, and from the judgment the plaintiff appealed.

J. H. Bryan, with whom was *Morehead*, for the plaintiff.

The action of debt is given by the Statute, *Westminster* 2, ch 11, (13 Ed. 1.)

Coke in his commentary on this statute, says that it is the duty of the sheriff to keep the prisoner in "*salva et arcta custodia.*" 2 *In.* 381.

Under this statute by judicial decisions in England, escapes had been classed into negligent and voluntary—the distinction is, however, only important where in a civil action, the sheriff pleads recaption before suit, which he may do when the escape is negligent only.

The sheriff here has been guilty of a negligent escape, and every escape, which does not arise from the act of God or the King's enemies, is, *in law*, negligent. 2 *H. B.* 111. 113 4 *T. R.* 789. 4 *Co. Rep.* 84, b. *Ex'r. Rainey* v. *Downey*, 2 Murph. 386.

The term "negligent escape," had acquired a legal and technical meaning and must be supposed to have been used by our Legislature in its well understood sense.

Our Statute of 1836 makes a marked distinction between the escape of a criminal, and that of a debtor—when the sheriff is indicted for the escape of a criminal "he may be permitted to shew that the escape was not by his consent or *negligence*, but that he acted with proper care and diligence," that is, that there was no *actual* negligence—*Rev. St.* 109—but in civil cases no such plea is given by the *Stat. Id.* 569. Upon the indictment where the inquiry is as to guilt, the knowledge of the sheriff is material—but in the civil action he is charged upon grounds of policy, as in the case of common covines: the law arms him with the whole power of the county for the purpose of keeping the debtor *safely*, and will not permit him to allege a rescue or breach of prison, unless by the public enemy—a release by a mob is no defence—*Elliott* v. *Duke, of Norfolk*, 4 T. R.

Waddell and *Norwood*, for the defendant.

RUFFIN, C. J. The action is founded on the Act of 1777, ch. 118; which gives debt against a sheriff, who shall "wilfully or negligently suffer" a debtor taken in execution, to escape. The question turns on the meaning of the term, "negligently," in the statute. It seems a little

singular, that at this day a definition of that expression should be called for, in reference to an escape. It is true, the statute does not directly define it, but the meaning, we think, is not the less clear. It seems to have been used as a word before appropriated to one kind of escapes, which was then the subject of legislation, and as already having a definite meaning in respect to that subject, and, therefore, not then needing explanation. At all events, it must be so understood. For it is an ancient rule for the construction of statutes, that, when they make use of words and phrases of a definite and well known sense in the law, they are to be received and expounded in the same sense in the statute. This has been applied to statutes creating crimes, and especially when the enactments are merely affirmative; as in the Act of 1779, making the "stealing" of a slave a capital felony. *Jernigan's case*, 3 Mur. 12. Indeed, this rule is not confined to the construction of statutes, but extends to the interpretation of private instruments. There are exceptions to it, where it is seen that a word is used in a sense different from its proper one, in instruments made by a person *inops consilii*. But that is a condition in which the legislature cannot be supposed; and, therefore, although the intention of the Legislature, as collected from the whole Act, is to prevail, a technical term, having a settled legal sense, cannot be received in any other sense, unless, at the last, it be perfectly plain on the Act itself, what that other sense is. This principle, which is as well one of common sense as of common law, seems to be decisive of the present question.

There are, at the common law, two kinds of escapes: the one, wilful or voluntary, as it is oftener called: the other, negligent. Whether before or after judgment, the common law gave an action on the case for an escape of either kind. The difference, and the only difference, between the consequences of voluntary and negligent escapes of a debtor in execution, was that in the former

case, the sheriff could not retake the party, whereas, in the latter he might; and, if he did so upon fresh pursuit, and subsequently kept the party in safe custody, the reception formed a defence to an action afterwards brought. In that state was the law, when the statutes 13 Ed. 1, c. 11, and 1 Ric. 2, c. 12, passed, and gave debt against sheriffs and the warden of the fleet, for escapes of debtors in execution. Immediately the principles of the common law, touching the two kinds of escapes, became applicable to the construction of the Acts, and they were applied to the actions given by the statutes as they had been to those given by the common law. The action of debt was held to lie as well for negligent, as for voluntary escapes; and, indeed, evidence of the one might be given upon a count for the other. Nothing could purge a voluntary escape, when prosecuted in either form of action; and in both, recaption before action brought for a negligent escape, was a bar. *Ridgeway's case*, 3 Rep. 52. *Bonafous* v. *Walker*, 2 T. R. 126. The statutes were merely affirmative, only giving a cumulative remedy for escapes, without undertaking to define them; and, consequently, they were, as to their diversities in nature, and in their defences, left to be ascertained by the common law. What was before a wilful escape remained so still; and to the action of debt for it there was no defence, that would not have equally barred an action on the case. So, likewise, it was with respect to a negligent escape, It was constituted as before; no old bar was taken away, nor any new one given. The liability of the officer in debt, depended, then, entirely upon the enquiry, whether he would be liable in the action on the case. Recourse was, therefore, necessarily had to the common law, to determine what is an escape, and what a wilful or a negligent one. Whenever a person, once under arrest, is at large, unless by the consent of the creditor, or the authority of law, it is an escape. It is said by Mr. Justice BULLER in *Bonafous* v. *Walker*, to be voluntary,

when it is by the consent or default of the officer. All other escapes are negligent. To the same purposes respectable text writers speak. Mr. *Phillips* says, "if it be with the knowledge or consent, or by the default of the gaoler, or sheriff's officer, it is a voluntary escape; if, without his knowledge, it is a negligent escape," 2 *Phill. Ev.* 397. *Mr. Stephens' N. P.* 1212, states "that an escape is negligent, when the party escapes without the consent of the sheriff or his officer; voluntary, where the sheriff or his officer permits him to go at large." And the words of Mr. Selwyn, N. P. 456, are, that "voluntary escapes are such as are by the express consent of the gaoler; negligent, when the prisoner escapes without the knowledge or consent of the gaoler;" and he adds upon the authority of *Stonehouse* v. *Mullins*, Str. 873, "that in either of those cases an action of debt may be maintained against the sheriff." In pleading also, the same distinction is kept up. In a plea of fresh pursuit and recaption, it is stated, "that the said L. S (the debtor) forcibly, wrongfully, privily, and without the permission, consent, knowledge, or default of the said defendant escaped," &c.; and the replication is, that the defendant "permitted and suffered" (or "voluntarily permitted and suffered") the said L. S. to go at large, whither he would, and to escape out of the custody of the defendant, &c. *Chitt. Pl.* 957—8 9, *C.* 1170—7 *Went.* 553. *et seq.* 5 *Went.* 228. Though differing slightly in words, these various passages agree in substance. that every going out of prison, with the knowledge or default of the keeper, is a voluntary escape, and that without his knowledge or default, it is a negligent one: and, that, for the purposes both of the action on the case, and of debt. Indeed, it it was so held in express terms by the Court of Common Pleas, in *Alsept* v. *Eyles*, 2 H. Bl. 108, in Trinity term, 1702; and in so holding the Court proceeded on a long train of authorities from a remote period up to that time, and not weakened by a single one to the contrary. It is

remarkable that at the same term, the question was also before the Court of King's Bench in *Elliott* v. *The Duke of Norfolk*, 4 T. R. 789; in which, without hearing the plaintiff's counsel, the Court sustained a demurer to a plea, that a mob of divers persons, riotously and feloniously with force (the said force being so great and violent that the defendant could not resist it) demolished the prison and rescued the debtor against the will of the defendant, and although he did as much as in his power lay to prevent the same. It is thus seen, that in the action of debt, as well as in case, the officer is liable for either kind of escape; except that when the escape is only negligent, the action will not lie unless brought before recaption, and except further that it will not lie at all when the escape was occasioned by the Act of God, or the public enemies. Although these positions were not disputed by the defendant's counsel, but were admitted to be law in England, yet it was necessary to advert to them particularly, for the better understanding of the grounds on which they rest, and their bearing on the construction proper to be placed on our statute. For, while it was admitted, that such was the nature of the escapes for which the common law gave and gives the action on the case, and for which debt is also given in England, by her statutes, it was contended in argument, that, by reason of the difference in the language of those statutes and ours, and of the difference in the condition and policy of the two countries, ours should receive a different construction—one whereby the sheriff is to be liable for such negligent escapes only, as spring from "actual negligence," or, from "gross and culpable negligence," as was contended for in another another case against this defendant at the present term. But neither the one nor the other of those reasons can, we think, produce the effect insisted on. So far from it, the difference between the enactments shews an intention to make ours the more explicit against the sheriff.

The language of the *St. Westm.* 2, is, "Let the sheriff take heed that he do not suffer (*non-permittat*) him to go out of prison without assent of his master; and if he do, and thereof be convict, he shall be answerable to his master of the damages done to him by such servant, according as it may be found by the country, and shall have his recovery by writ of debt." The statute, 1 *Ric.* 2, after reciting that persons, divers, "at the suit of the party, commanded to the prison of the Fleet by judgment, be oftentimes suffered to go at large by the warden of the prison, sometimes by mainprise or by bail, and sometimes without any mainprise with a baston of the fleet, &c. without their assent, at whose suit they were judged, and without their gree thereof made, whereby a man cannot come to his right, and recovery against such prisoners, to the great mischief and undoing of many people," then ordains, "that from henceforth no warden of the fleet shall suffer any prisoner, there being by judgment at the suit of the party, to go out of prison, without making gree to the said parties of that whereof they were judged, unless it be by writ, or other commandment of the King, upon pain to lose his office. And, moreover, if any such warden from henceforth be attainted by due process, that he hath suffered or let such prisoner to go at large against this ordinance, then the plaintiffs shall have their recovery against the same warden by writ of debt." The recital in the latter statute is only of escapes that are clearly voluntary, and the operative words of the former are, "*suffer* to go out of prison," and of the latter, "*suffer or let* such prisoner go at large;" and therefore it might very plausibly have been contended, (as it was, as late as the case of *Alsept* v. *Eyles*,) that, by a fair construction, they only gave debt for escapes with the knowledge and actual permission of the officer. Yet the contrary has been uniformly deemed the proper construction; and it was held, first, that debt would lie for a negligent escape, and, secondly, that in order to sup-

port the action it was not necessary to shew any specific act of negligence, as every escape, not arising from the act of God, or the King's enemies, was in law a negligent escape at the least. Why was this? The answer is obvious. It is, that the statutes merely give a new remedy for escapes generally, without undertaking to define them, and without excepting a negligent escape; and therefore that the action must lie for whatever was by the common law an escape, for which an officer was, at the common law, liable in damages. Hence, Lord Coke makes no distinction between voluntary and negligent escapes, in his comments on the statutes, 2 *Inst.* 382. And Lord Loughborough in delivering the judgment of the Court in *Alsept* v. *Eyles*, cites a case from the year book 33 *Hen.* 6, of an action of debt, for an involuntary escape. The same point was expressly decided in *Stonehouse* v. *Mullins*, and in the other more modern cases already cited. Thus the statutes were construed in reference to the common law; and in giving debt for "an escape," they were necessarily held to mean whatever was legally an escape, whether voluntary or negligent. Then, how much more conclusively is the Court here bound to take the terms of art employed in our Act, according to their previous legal acceptation, as equally embracing both kinds of escape as understood at the common law, when it does not merely say, that debt shall lie, if a sheriff "suffer" a debtor to "escape," but its tenor is, that it shall lie, if he "wilfully *or negligently* suffer "such" "escape?" How is it possible for us to suppose, that the Legislature meant in this Act a different kind of negligence from that which was known to the common law and had been applied to the statutes of *Ed.* 1, and *Ric.* 2? It was argued, indeed, that, inasmuch, as the English statutes were in force here, some difference is to be implied from the fact of passing a statute here on the subject; and that the implication is strengthened by the change of phraseology in ours;

and then, as our policy is less stringent than that of England in enforcing payment of debts by process against the person, it is insisted that it is a reasonable hypothesis, that the difference intended was, that in the case of a negligent escape, the negligence must be actual, gross, and culpable. But that course of reasoning is not just, according to the analogies of the law, nor in furtherance of justice, and good morals. Very sufficient reasons may be assigned for the enactment or re-enactment by our Act, without recurring to the considerations supposed. It does not appear that the statutes of *Edward* and *Richard*, were ever in use here, and it is not certain that, from their terms, they would have been deemed in force. At any rate, they were couched in terms, that had, in some degree, become obsolete, and were in themselves so vague, as to have made it necessary to resort to a latitudinous equitable construction, in order to embrace cases and persons that were within the mischief, though not the letter of those statutes. It is more consonant with modern and just legislation, that the statute laws should plainly and directly provide for all they are intended to cover, instead of employing the vague generalities of the early ordinances of parliament. Besides, our Act was necessary, in order to extend the remedy for escapes to cases of attachments or executions for money decreed in Chancery; and, again, to make the action survive, as well against the executor of the sheriff, as for the creditor's executor, which was not the case in England, *Dyer* 271, 322. 1 *Raym.* 399. These considerations sufficiently account for the enactments of our statute, and for its particular provisions.

That the language used in it is to receive a different interpretation from that which it ought and would, were it an enactment of the British parliament, because in the habits of our country, and the course of our legislation it is supposed a policy is seen less favourable to the rights of creditors, than that which has prevailed so steadily

in the mother country, is altogether inadmissible. In a republic, as much, at least, as in a monarchy, the laws, as made and as administered, should make men honest in the payment of their debts, and officers faithful in the performance of their duties. Nay, it is of more consequence in a republican government; for its stability and wholesome operation depend more essentially on the virtue of the people, and nothing is more speedily or certainly destructive of private and of public virtue, than to relax the obligation of contracts, and render the rights of creditors insecure. It is doing some evil, and we think much injustice to our institutions, to suggest that such a course has been settled on here, or that there is a tendency to it. The supposition cannot be tolerated, that the law is of less binding force here than in any other country. The judiciary, at all events, can never adopt it, unless it should become—that greatest of curses which can befal an unhappy and degraded country—dependent, and then, necessarily the weak, or pliant instrument of popular impulses. The Courts can act upon no such principle further than they may be compelled by positive and unequivocal constitutional enactments. None such have, as yet, passed; and we trust, they never will. The statute now under consideration is, on the contrary an honorable monument to the purpose of sustaining the modes derived from our forefathers of enforcing the satisfaction of recoveries by judgment. It seems, indeed, to be somewhat characteristic of the present age to regard, with less severity than formerly, the contracting of debts which the party is not able in the event to pay. The world is making an experiment, how far the morals of mankind can be preserved, while persons shall be exempted from bodily restraint or punishment for such delinquencies. Our legislature, like others, has, to some extent, ventured on this experiment. The issue can be made known, with certainty, only by time. But all the changes, as yet made in our law, profess to be for the relief, only, of honest in-

solvents: that is to say, honest, in the sense, at least, of having no property, or of giving up what they have. There may be a difference of opinion about the policy of that degree of immunity for obtaining a credit, to which one was not entitled; and the details of the system may be defective in not sufficiently guarding against fraud in contracting debts and disposing of the debtor's property. If that be so, it only shews that the system needs amending. But it is very far from shewing a legislative intention or popular purpose, either to exonerate dishonest debtors—those who have property but conceal it, and will not surrender it for the benefit of creditors—from imprisonment altogether, or to subject them only to the insecure custody of an irresponsible keeper. As to such debtors, the principles of the laws of our ancestors, whether the unwritten or the written laws, are preserved in full vigor here. We have the same executions against the body; and, if the debtor cannot, or will not avail himself of the benevolent provisions of the acts for the relief of insolvent debtors, he is liable to the same close and safe custody, which the policy, and the morality of the common law prescribed, as the means of enforcing payment of debts. It follows, if the gaoler will not execute the law in that respect, but from any cause, which he was not incapable of counteracting, "suffers or lets prisoners to go at large," (as expressed in *St.* 1, *Ric.* 2,) "without their assent, at whose suit they be judged, whereby a man cannot come to his right and recovery against such prisoners, to the great mischief of many people," that the creditor ought to have redress against the gaoler; and that, not merely in damages, which the jury may, in the dark, suppose to be adequate to the loss or inconvenience to the creditor, but, to prevent such defaults, voluntary or negligent, and to render the redress effectual, by giving to the party, in the words of Mr. Justice Buller, that remedy against the gaoler, which he had against the debtor. Such is the plain and expressed intention of the

Act of Assembly. Unfortunately too, for the argument drawn from the supposed opposition in the policy of our present and former governments, these provisions were not first introduced into the statute book by the Act of 1777. They form parts of an Act of 1755, Ch. 2, found in the revisal of Davis, printed in 1765. By the 21st section, a summary judgment on motion is given against a sheriff, who hath levied or received any money on execution, or hath taken the body of any defendant upon execution and "suffered him or her to escape with the consent of such sheriff;" and by the next section it is enacted, "that where any sheriff shall have taken the body of any debtor in execution, and shall wilfully or negligently suffer such debtor to escape," the creditor and his executor may have an action of debt against the sheriff and his executor. The act thus evidently preserved the legal ideas of the different kinds of escape—in effect defining that which is wilful to be an escape "with the consent of the sheriff," and, consequently, that a negligent escape was one without such consent. If the term "negligent" is to be understood in any other sense than its ancient one, we ask, in what other signification did the legislature use it, as faras can be collected from the act? What is meant by "actual," or "gross and culpable" negligence, in reference to escapes? The law had said, that there was negligence, which made the sheriff culpable, and liable to the party's action, if the escape occurred without the act of God or the public enemies; and there is nothing in the act to say, that it should not be so deemed. Sheriffs are not the only persons, of whom the same degree of diligence is exacted. It is required also of common carriers—the law properly putting both on the same footing, because the same reasons apply equally to both. Lord Coke so treats them in *Southcote's case* 4 *Rep.* 83. They each undertake a duty for reward, and it is a duty of such a nature as to present constant opportunities and strong temptations to betray the trust, if evidence of col-

jusion or of some particular omission of due care and caution were necessary to charge them. The security of those, who employ common carriers and keepers of prisons, from the most mischievous unfaithfulness, renders it indispensable, that they should be insurers; and, therefore, the law pays them, and justly holds them responsible, as such.

There is another consideration, which presses strongly against receiving "negligent escape" in the act in any new sense. It is, that it would put an end at once to the beneficial and well established doctrine of recaption or fresh pursuit. Although the law will not allow the sheriff to imprison and enlarge the party at his caprice from time to time, and, therefore after a voluntary escape, the sheriff cannot re-take the party, yet it is otherwise when the escape is without the connivance of the sheriff and merely negligent. In this latter case, the debtor has no claim on the benignity of the law, even against the sheriff, for exoneration from re-imprisonment, and therefore the sheriff is allowed to re-take him. If the creditor choose to hold back and not sue the sheriff for the escape, until he shall have been at the trouble and expense of a re-capture, and incurred the further risk of the debtor's detainer thenceforward, until he satisfy the judgment, the law may well, and does deny, any action for the previous escape. But it is manifest that this supposes that an action lay for the escape thus purged by the recaption; and hence arise the interest, power, and duty of the sheriff to recapture. Therefore, if in any case the creditor could not have his action against the sheriff for the escape itself, there would be no motive or obligation on the sheriff to retake the debtor. For, the law does not give the action of debt for a default of the sheriff in not taking the body in execution or retaking it; but only for an escape from custody. Hence, if there be an escape by the act of God, or the public enemies, no action arises therefor; and if in such case the debtor appear openly, there is no ques-

tion, that the right to the action of debt would not arise for the default of the sheriff in not retaking him, but the creditor would be put to another *ca. sa.* Now, if the action does not, by our statute, accrue upon the fact of the escape, as legally importing negligence, but only when it is shown, that there was "gross and culpable negligence;" and committing the debtor to a new prison that was supposed to be secure, and locking him in, is to defeat the action as the act of God, or of the public enemies does, it follows that the sheriff is not obliged, in this case, more than in the other, to retake the debtor, in order to give him a bar to the creditor's action—for, upon this hypothesis, the action of debt never arose. It is true, the creditor might issue a new *ca. sa.*; but that would only be effectual, if the debtor remained within the jurisdiction, and, indeed, would give that sheriff no authority to go out of his county. The legislature can never be supposed to have intended, that a sheriff should be thus excused for an escape, though he make no effort to retake the debtor, and that recoveries by judgment should be thus defeated. Moreover, that the escape took place from a new and sufficient gaol is no palliation, but, upon legal analogy, an aggravation of the negligence, by which it happened. Thus, a sheriff may return a rescue upon *mesne* process, as he carries the party to gaol; yet, if he get him once within the prison, though the custody be by *mesne* process only, he must hold him at all events, and a rescue will be no excuse, unless it be by the public enemies. This is laid down by Chief-Justice PRATT in *Crompton* v. *Ward*, Str. 429, as law, not to be disputed. It is as indisputably law, that a rescue of one taken in execution, and on the way to gaol, cannot be returned, unless it be by public enemies; for a sheriff is bound, in such case, to have his *posse* sufficient to overcome all force from rioters or mobs. *Dyer* 241, *May* v. *Proti*, Cro. Jac. 419. By parity of reasoning, it follows, that still less can

a rescue excuse the sheriff, after he has the additional security of the walls of the prison for the custody of his prisoner in execution.

This question has been discussedthus elaborately, not because it appeared to the court to have any intrinsic difficulty, but from the respect due to the opinion, to the contrary of the learned Judge, who presided at the trial, and to the zealous, full, and able argument at the bar; and, moreover, because the point is of importance in itself. No member of the Court, however, has entertained any doubt on it; but we have all (including our late brother DANIEL, who heard the argument,) considered it plain, both upon the general reasons here given, and as concluded by adjudications in this State. We know that there have been many recoveries on the circuits both in case, and debt for negligent escapes, as understood at common law. The propriety of them was never questioned, except in the single case of *Rainey* v. *Demming*, 2 Murph. 386; and there the eminent Judge, who sat in the Superior Court, did not hesitate, as soon as he had the opportunity of looking into the authorities, and conferring with the other Judges, to retract his opinion, and become the organ of the Court to reverse his judgment. The case was decided at the last term of the Supreme Court, as formerly constituted, and, both Judge DANIEL, and I were members of it, and remember that neither of the five Judges, then in the Court, had the least doubt of the law, as there laid down, and of its application to the action of debt, as well as to the action on the case then before the Court. It would be strange, indeed, if that, which is in law a negligent escape in one action, should not be a negligent escape in another action.

All the considerations, then, that can weigh with a Court, the just principles for the interpretation of statutes, the authority of adjudications, and ancient writers on the law, and a regard to sound policy, and good morals—

concur in producing the conviction, that the judgment is erroneous.

Per Curiam. Judgment reversed, and *venire de novo* awarded.

DEN ON DEMISE OF WILLIAM A. WHITFIELD & AL. vs. HATCH WHITFIELD.

In an action of ejectment, where an arbitration had been agreed upon, and the award was not made until after the death of one of the lessors of the plaintiff, *Held* that the award was void.

Though John Den, by fiction of law may be the ostensible plaintiff in an action of ejectment, the Court will not suffer such a fiction to work an injury to the parties really interested.

Appeal from the Superior Court of Law of Wayne County, at the Fall Term, 1847, his Honor Judge Manly presiding.

This was an action of ejectment, in which the following facts appeared.

The declaration contains three several demises, the 1st from W. A. Whitfield, the 2d from James Herring, and the 3d from Buckner Hill. The defendants entered into the common rule, and pleaded not guilty. At Fall Term, 1846, the following order of reference was made: "This case is referred to James Griswold and Nicholson Washington, with leave to choose an umpire in case they disagree, and their award, or that of their umpire to be a judgment of this Court." Between the referring of the case, and the making of the award, James Herring, the lessor of the plaintiff in the 2d demise, died. At Fall Term, 1847, the arbitrators returned their award. A motion was made on the part of the defendant, for a judgment on the award, and the plaintiffs moved to set it aside. Both motions were over-ruled by the Court, and the defendant appealed.

Mordecai and *Bryan*, for the plaintiffs.

1st. One of the lessors of the plaintiff (James Herring,) it appears from the award itself, has died since the submission. It is sufficient cause to set aside the award. See *Chitty's Gen. Prac.* 103.

2d. The arbitrators proceeded without giving proper notice to *all* the parties. This is good cause to set it aside. *Salk.* 71. *Chitty's Rep.* 44. 2 *Chit. Gen. Prac.* 96.

3d. The rule of reference is a simple one, and all the arbitrators had a right to do, was to decide as to the legal rights of the parties and which was entitled to the verdict. The rule cannot bring before the arbitrators more than was in issue before the Court. *Den. dem. Hardin* v. *Beatty & al*, 4 Dev. & Bat. 381.

Here the arbitrators not only undertake to decide this, but they adjudicate the right to the land. See *Den. dem. Duncan* v. *Duncan*, 1 Ired. 466.

4th. The main award is vague and uncertain, in first awarding that Wm. A. was a trustee for defendant and

bound to account and re convey; and secondly, that he had been guilty of fraud and *no* title passed.

5th. Award purports to be founded on evidence and *notes* of counsel. These the arbitrators had no right to use.

6th. The arbitrators profess to decide according to law, and have mistaken the law. This is good cause to set it aside. 2 *Chit. Gen. Prac.* 109. *McRae* v. *Robinson*, 2 Murp. 127. *Ryan* v. *Blount & al.* 1 Dev. Eq. 382.

In order to avoid the sale, there must be found a combination between the sheriff and the purchaser. *N. C. T. R.* 114. *Jones* v. *Fulgham*, 2 Murp. 364.

Strange, for the defendant, argued—

That the Court ought to have entered judgment on the award, either 1st, according to its terms, or 2ndly, a judgment in favor of the defendant in the particular suit, or 3rdly, a judgment of non-suit against the plaintiff.

1st. That the death of Henry made no difference in action of ejectment as John Doe never dies.

2nd. That as Henry was dead, notice to him was dispensed with and the arbitrators are themselves the judges of notice. *Watson on awards* 170. *Wood* v. *Leake*, 12 Ves. 412.

3rd. That the arbitrators upon the question of fraud had not undertaken to decide according to law, and, if they had, their decision was according to law.

4th. That the practice of referring causes is sanctioned and approved by this Court in many cases, especially in *Tyson* v. *Robinson*, 3 Ire. 333, and that the Court will intend every thing in favor of an award *Carter* v. *Sams*, 4 Dev. & Bat. 182.

5th. That an alternative award is good. *Watson on awards* 125, *Lee* v. *Elkins*, 12 Mod. 585.

6th. That a judgment of non-suit in an action of ejectment is as final, as any other judgments that can be rendered in favor of the defendant—and so far as the suit is concerned is final.

NASH, J. We concur with his Honor in his opinion. The arbitrators decide, that upon a careful examination of the evidence, they decide that W. A. Whitfield, the lessor of the plaintiff, in purchasing the land at the sheriff's sale made under an execution against the defendant, Hatch Whitfield, issued on a judgment obtained by him against said Hatch, had been guilty of a fraud, and that the suit should be dismissed at the costs of the lessors of the plaintiff. In effect it is an award that a judgment of nonsuit should be entered by the Court against the lessors of the plaintiff. This is a definite and distinct judgment pronounced by the arbitrators upon the case, as submitted to them, and was certain and conclusive so far as this action was concerned. In *Blanchard* v. *Lilly*, and *Rex* v. *Blanchard*, 9th East. an award directed that certain actions should be discontinued, and each party should pay his own costs, it was decided that the award was final and good, it being in effect an award of a *stet anteprocessus*. *Hartwell* v. *Hill*, Forrest 73. There is, however, a fatal objection to the Court giving a judgment upon this part of the award. The arbitrators state, that at the time they made the award, James Herring was dead. His death was a revocation of the submission, so far as he was concerned. It is answered, however, by the defendant, that John Doe, is, in law, the plaintiff, and as *he* never dies, the trial of an ejectment is not delayed, nor the case abated by the death of his lessor. This, in practice, is true. The action of ejectment is pretty much a fiction, resorted to by the Courts to try the right of possession to land, and John Doe is a fictitious person. But the Courts never will suffer their own fictions to work a positive wrong. The question is not here, as to the abatement of the suit, or of the demise from James Herring, but it is of the revocation of a power given by him to certain persons, to try a certain cause; and it cannot admit of a doubt, that the power of an arbitrator is determined by the death of the party to the submission or any

one of them. 2 *Tidd's Pr.* 877. 2 *Chit. Pr.* 432. The Court, therefore, cannot give judgment for the defendant upon this portion of the award. Neither can the Court give judgment upon that portion, which, as the arbitrators tell us, was the result of an equitable view of the case. It is not within this submission. When parties intend to submit all disputes, the terms of the reference ought to be, "of all matters in difference between the parties," and when the difference is intended to be of the matter embraced in a particular case, it should be, "of all matters in difference in the cause," or words to that effect. *Smith* v. *Muller*, 3 Term R. 624. Of the latter character, is the order of reference in this case; *this* case is referred, &c. The case is one of ejectment, and there is nothing in the order, looking out of the case. With a view to settle all the differences between the parties, the arbitrators have assumed the jurisdiction of the Court of Equity, settled their accounts and adjusted balances, and ordered and directed the payment of the moneys adjudged by them. This was not within the scope of their authority, as exhibited in the order of reference. If there was any other reference, the parties must enforce the award by some appropriate action in the proper Court.

The Court therefore cannot grant to the defendant any judgment upon the award, but in the language of his Honor below, "leaves the parties to such remedies as they may respectively have thereon."

We see no error in the interlocutory judgment of the Court below.

This opinion must be certified to the Superior Court of Wayne County.

PER CURIAM. Ordered accordingly.

THE STATE, UPON THE RELATION OF A. H. SAUNDERS, TRUSTEE, &c. *vs.* JAMES L. GAINES & AL.

A clerk and master, who sells land under an order of a Court of Equity for the purpose of partition, acts under such order as an officer of the Court, and is liable on his official bond for any breach of duty, in not complying with the orders of the Court in relation thereto.

Therefore, where a clerk and master sold land under such an order, received the proceeds, and was directed by the Court to pay over to the persons properly entitled by law, and the heirs did not make their claim within three years; *held*, that he was bound to pay the same, under the provisions of the first section of the seventy-sixth chapter of the Revised Statutes to the Trustee of the County, of whose Court he was clerk and master, and that, for a default in doing so, he and his sureties might be sued on his official bond.

Held, however, that where the Court had not directed the disposition of the money, received on such sale, though it had remained in his office for three years, he was not liable to the County Trustee.

The case of *The Judges* v. *Deans*, 2 Hawks 138, cited and approved.

Appeal from the Superior Court of Law of Montgomery County, at the Spring Term, 1847, his Honor, Judge BATTLE, presiding.

A petition was filed in the Court of Equity for Montgomery County, of which the defendant was Clerk and Master, to sell land, for the purpose of partition. The defendant was appointed a commissioner to make the sale, and he accordingly made the sale, and returned his report to Court. The last order made in the case was as follows: "Report of sale filed and confirmed and ordered that the Clerk and Master of this Court, proceed to the collection of the purchase money, that he make title to the purchaser, and that he proceed, on the collection of said purchase money, to pay it over to those entitled to

receive the same." It is admitted that under this order the Clerk and Master, has in his hands the sum of $100, and has had it more than three years. It is further admitted by the defendant, that he has in his hands another sum of ten dollars, which he has had more than three years, arising also from the sale of lands made by him as commissioner, upon a petition for that purpose, in which no final decree has been made, and which he retains under an interlocutory order, made in the case, and that no one has applied for either sum, under the decrees. The relator, as Trustee of Montgomery County, demanded these two sums of money from the defendant, which he refused to pay. The action is brought in debt, on the official bond of the defendant, and the breach assigned, the refusal to pay. The pleas are conditions performed and not broken.

The first section of the 76th chapter of the Revised Statutes, makes it the duty of the Clerks of the County, Superior and Supreme Courts, and every Clerk and Master, at the first Court of which he is Clerk, which shall be held after the first day of August in each year, to produce to the Court a statement of all monies, remaining in his hands, which were received by him officially three years or more, previousyl thereto.

The second section directs, that these balances shall be paid over to the officers appointed to receive and disburse the County funds; and, by the third section, the Clerk, failing to make the required payment, is, together with a penalty, rendered liable to pay such monies as he may be chargeable with, under the provisions of the Act. On the part of the defendant, it is alleged he is not liable under this Act, because he did not receive the money as Clerk and Master, but as the commissioner of the Court. Upon the case, as agreed between the parties, the Court below was of opinion, and so gave judgment, that the defendant was liable upon his official bond for the one hun-

dred dollars, mentioned in the case; but not for the ten dollars.

From this judgment both parties appealed.

No counsel for the plaintiff.
Strange, for the defendants.

Nash, J. We concur with his Honor on both points. The question now presented, was before the Court in the case of the *Judges* v. *Deans*, 2 Hawks 132. That was an action of debt, brought against the defendant as one of the sureties to the official bond of Howell Jones, who was the Clerk and Master of Hertford County. A decree had been obtained under a bill for the sale of land, and the Clerk and Master was appointed to make it; a sale was made and the report confirmed, and an order made, that the Clerk and Master should pay over to the complainants the bonds taken at the sale; and for a breach of this order, the action was brought. On behalf of the defendant, it was contended, there as here, that the act complained of, was not a breach of his official duty; that the Clerk had received the bonds, not as Clerk but as a commissioner; as an individual selected by the Court, for the performace of a certain act. The defence was not sustained by the Court; it was decided, that, in every part of the business, the Clerk acted officially, and more particularly as to that part of the decree, which required he should pay over the bonds, &c., for the reason that his office was the proper place for their deposit. In this case, the order of the Court is, "that the Clerk and Master of *this* Court, proceed to the collection of the purchase money, that *he* make title to the purchasers, and that *he* proceed on the collection of the purchase money, to pay it over to those entitled to receive the same." Throughout this order the Court speak to their own officer, as Clerk and Master, and not as Commissioner. As Clerk and Master, and he is to make title, receive the purchase money,

make distribution. It is impossible to conceive duties more official, than those to be performed under this order. In not paying over to the relator the one hundred dollars, on his demand, the Clerk was guilty of a breach of his bond. He was, by the decree, directed to pay the money to the parties, who were entitled. It had been in his hands, as Clerk and Master, three years, without any one appearing to claim it, and, under the Act referredto, the relator was entitled to have it delivered to him.

We see no error in the judgment of the Court as to the Ten Dollars. It was not sufficient to enable the plaintiff to recover, that it should appear the money had remained in the office three years, and that the defendant had refused to pay it; but it must further appear, that it was money payable to some particular person. These are the words of the Act. The case states that it was retained by the Clerk and Master under an interlocutory order of the Court. What that interlocutory order was, we are not informed; it may have been one requiring the Clerk to retain it until the further order of the Court, to enable the Court, for instance, by a proper enquiry, to ascertain to whom it belonged. In such a case, the refusal to pay it to the relator would not be a breach of his bond; the action of the Court upon it was not final. We cannot, in this case, in relation to that money, see that the defendant has been guilty of any breach of his official bond.

Per Curiam. Judgment affirmed.

WILLIAM A. HAMLIN *vs.* DANIEL McNEILL & AL.

Under the plea of *nul tiel record* to a *scire facias* against bail, no evidence can be given of any objection to the bail bond. The bail bond is no part of the record.

A plea that the defendants were not bail is not a good one.

If the persons alleged to be bail wish in any way to avoid the bond, they must plead *non est factum.*

Appeal from the Superior Court of Law of Chatham County, at the Fall Term, 1846, his Honor Judge BATTLE presiding.

This is a *scire facias* against Daniel McNeill, John McNeill, and Henry Arnold, as the bail of James McNeill, in an action of covenant brought by the plaintiff against James and Daniel McNeill. Among other pleas were that of *nul tiel record*, and also that John McNeill and Henry Arnold were the bail of Daniel McNeill, and not of James McNeill.

Upon the trial, the plaintiff produced the record of his recovery against the principal, James McNeill. It appeared thereon, that the action was brought against James McNeill and Daniel McNeill, to September Term, 1840, of the Superior Court, and that at March Term, 1841, the plaintiff entered a *nolle prosequi*, as to Daniel, and afterwards recovered judgment against James, as set forth in the *scire facias.*

The defendants then gave in evidence the bond, which, as they alleged, was that they entered into as the bail bond. It purported to have been given by James McNeill, Daniel McNeill, John McNeill, and Henry Arnold, with a condition, "that if the above bounden James McNeill and Daniel McNeill, do make their personal ap-

pearance at &c. then and there to answer William Hamlin of a plea of covenants broken to his damage," &c.

The counsel for the defendants thereupon insisted, that from the bond itself it appeared, that Daniel McNeill was one of the defendants in the action of covenant, and executed the bond as a principal and not as the bail of the other principal, James McNeill; and, therefore, that as the *scire facias* alleged, that the three defendants were the bail for James McNeill, there was such a variance between the *scire facias*, and the bond, that the plaintiff could not recover in this action against any of the defendants. Other points were made by the counsel, but the Court gave no opinion on any one, but that here stated; and on that the opinion of the presiding Judge was for the defendants. From a judgment accordingly the plaintiff appealed.

No counsel for the plaintiff.

D. Reid, Strange, Kelly, and *Haughton,* for the defendants.

RUFFIN, C. J. As the bond was not put upon the record by oyer, nor its execution, contents, or operation, put in issue by the plea of *non est factum*, the point decided could in no way arise. It was argued, indeed, that the bail bond was by law returned with the writ, and therefore, that it makes part of the record, which the plaintiff was obliged to produce under the issue on *nul tiel record.* But it has been expressly decided to the contrary. *Mason* v. *Cooper*, 1 Law Repos. 472. So far from its being part of the record within that issue, the Act of 1777, Rev. Stat. ch. 10, s. 6, assumes that the plea must be *non est factum*, in order to put a bail bond its issue, and prohibits its admission unless upon affidavit of in truth. If it formed part of the record, its execution could not be

contested at all; and the consequence would be, that a person would be concluded by the return of the sheriff. It is not like the cases cited from the English Courts of *nul tiel record* pleaded to *scire facias* on recognizance of bail; for the recognizance is a judicial act of record, but the bail bond is an act *in pais* by the sheriff. Such being the case there was no mode, in which the defendants could legally get the bond before the Court on these pleadings. The plea, that the defendants were not the bail of James McNeill, is but collaterally traversing the operation of the deed, executed by the defendants themselves, which cannot be done; for as the liability arises upon the deed, it is to be put in issue by the party upon *non est factum* only. On that plea, advantage may be taken of a variance in the tenor or legal effect of the instrument from that stated in the pleadings.

Of course under those circumstances it is unnecessary, if not improper, that the Court should discuss or decide on the correctness of the opinion given in the Superior Court.

Per Curiam. Judgment reversed and *venire de novo*.

GEORGE NORTHAM *vs.* WILLIAM R. TERRY & AL.

A sheriff has no authority to take a bond for keeping the prison bounds from a person arrested, until after he has been committed to close custody; and a bond so taken is void.

When a summary judgment is moved for on such a bond, it is not necessary for the defendants to plead *non est factum*, but they may give the whole matter in evidence to the Court.

Appeal from the Superior Court of Law of Richmond County, at the Spring Term, 1847, his Honor Judge DICK presiding.

This was a motion in the Superior Court for judgment on a bond given to the sheriff for keeping the prison bounds. The plaintiff produced the bond, which had a condition in the usual form, reciting the arrest of William R. Terry on a *ca. sa.* at the suit of the plaintiff, and to be void, "if the above bounden, W. R. T., shall keep himself continually within the rules, &c. until he shall be discharged therefrom according to law." In opposition to the motion, the defendants gave evidence, that the sheriff did not commit him to prison, but took the bond when Terry was arrested and before committing him to prison, and thereupon discharged him from custody; and they insisted that the bond was for that reason void. The plaintiff, on the contrary, insisted that the bond was, notwithstanding, good; and also that the defendants could not raise the objection, as they had not pleaded *non est factum*, and supported it by affidavit.

The Court being of opinion with the defendants, refused the motion, and the plaintiff appealed.

Strange, for the plaintiff.
No counsel for the defendants.

RUFFIN, C. J. The Act of 1777, *Rev. Stat. Ch.* 109, *Sec.* 19, makes all bonds, taken from persons in their custody by sheriffs, by color of their office, void, unless they be taken payable to the sheriff as such, and dischargeable upon the prisoner's appearance, &c., or upon "such persons keeping within the limits and rules of any prison"—unless, in any special case, any other obligation shall be directed. That Act and those of 1741, and 1759, which provide for laying out the prison bounds, taking the bond, and the remedy on it are *in pari materia* and to be construed together; and they shew very clearly, that, when the bond is taken, the party is not only to be a prisoner in custody, but also a prisoner in gaol. The Act of '41 provides, that, "for the preservation of the health of such persons, as shall be *committed to prison*," the Court may lay out limits; and every *prisoner*, not *committed* for treason or felony, giving good security to the sheriff to "keep within the said rules," *may walk therein out of prison*, and *such prisoner*, keeping continually within the rules, is declared a true prisoner. So, the preamble of the Act of 1759 recites that of 1741, as enacting, that every person *committed to gaol*, not for treason or felony, upon giving bond and security to the sheriff, may have the liberty of the rules of the prison *to which he is committed*: and then it enacts the remedy by motion on bonds given by persons *committed*—not taken—on a *ca. sa.*

It further enacts, that no person *committed to gaol*, on execution on a judgment or the prison-bounds bond shall be allowed the rules. It is clear, therefore, that it was not the object of these Acts to prevent the imprisonment of persons taken in execution; but, on the contrary, both the words and the policy of the statutes shew the purpose to be simply to preserve the health of those, who are so unfortunate as to be in prison. By taking a bond from a per-

son in that situation, the sheriff is guilty of no escape, in letting him out of the walls of the prison; for he does only what the law requires of him, and the party is deemed a true prisoner, while he keeps within the rules. The law supposes that he will thus continue a prisoner, under the obligations of the bond, which it authorises; and that if he forfeits the bond, it will, at least, not be with the concurrence of the sheriff, and *eo instanti* that it is given. But it is manifest, that there can be no such idea, when a bond is taken from a person before he is carried to prison. The purpose of such a bond can be no other than to indemnify the sheriff for a voluntary escape of his prisoner. This is set in a clearer light by supposing, that the bond here had been conditioned, that the debtor "should without delay go to the prison and thereafter keep within the limits." It would be plain upon its face, that it was taken for the illegal purpose, just mentioned, of securing the sheriff for *not committing* the party to prison, and leaving him at large, to go or not to go there, as he pleased; and therefore it would be void by the express words of the Act of 1777. It follows, that as the fact does not appear in the bond, it may be averred and proved; for, when a statute avoids an instrument for any cause, it can create no estoppel, but the facts, which bring it within the statute, may be shewn by plea; as in a case of usury, or of a bond taken by a sheriff contrary to the *St.* 23, *Hen.* 6—from which, indeed, our Act of 1777 was taken. It is apparent, then, that the bond was taken for ease and favour to the debtor, and to relieve the sheriff from the labour and risk of carrying him to prison, by indemnifying him for the escape. Consequently it is void, and the sheriff cannot discharge himself from his liability for the escape, by assigning the bond, to be enforced by the creditor.

The manner of making the defence was also proper. The proviso, that the obligors shall not plead *non est factum*, unless upon affidavit of its truth, is inaccurately expressed;

for as the proceedings are summary, without process or declaration, there can, strictly speaking, be no plea. The meaning is, that the obligors shall not be allowed to deny the execution—the *factum*—of the bond, returned on his oath by the sheriff, without doing so on their oaths. But they are not precluded from other defences, because they cannot deny the execution of the bond. It would, for instance, be a good answer to the motion for judgment, that the creditor had assented to the debtor's going out of the rules, or that the latter had paid the debt, or been in any other manner discharged. So, certainly, the defendants may insist, that the bond, though given, is void, because it is insensible or contrary to the statute. Objections of the last kind cannot in general be taken upon *non est factum*. If they appear upon the bond and declaration, the defendant may demur, or move in arrest of judgment. *Samuel* v. *Evans*, 2 T. R. 569. That seems to be peculiar to cases arising under the statute 23, *Hen.* 6; for in other cases, as in usury, or gaming, appearing on the instrument, the defendant cannot demur, but must plead the facts and insist on the statute specially. 1 *Saun.* 295. 1 *Chit. Pl.* 520. No, doubt, the defendant may also avail himself of defects apparent on the bond, and not stated in the declaration, by pleading *not est factum*, and thus compelling the plaintiff to produce the bond on the trial and exhibit its variance from the declaration or its intrinsic vice. But when its illegality, as here, does not appear in the bond, the proper and established course is, to put the facts on the record by plea, which will bring the case within the statute, concluding, "and so the said J. C. says, the said writing with the said condition, &c., by virtue of the said statute is altogether void and of no effect in law; and this" &c. *Lenthall v. Cook*, 1 Saund. 156. As the present proceeding, however, is by motion, the whole matter is open to evidence without plea, excepting only that the creditor is not bound to prove the bond, unless the other party

shall deny its execution on oath. The usual course is to hear affidavits on each side on which the Court acts. No doubt, however, that in a proper case, as when it is doubtful how the facts are upon the proofs, the Court may direct an action to be brought or direct an issue to be tried by a jury. But the facts are not even disputed here, and the sole question was, as to the validity of the bond, upon those facts, under the statute.

PER CURIAM. Judgment affirmed.

THE STATE ON THE RELATION OF LEWIS CLARK, ADM'R. OF JORDAN *vs.* WILLIAM S. CORDON.

Where in a suit on a guardian bond it appeared that the account between the guardian and the ward had been settled, and that the guardian gave his own bond to the ward, which was received by the latter in satisfaction of the balance due, and he then gave his guardian a receipt: *Held*, that this was a sufficient defence to the suit on the guardian bond.

The same defence, which might be made to an action at law or suit in Equity, brought in the name of the ward himself against the guardian, is good in an action brought on the bond.

The case of the *State* v. *Lightfoot*, 2 Ire. 306, cited and approved.

Appeal from the Superior Court of Law of Beaufort County, at the Spring Term, 1847, his Honor, Judge BATTLE, presiding.

This is an action of debt on a bond given by Cordon and the other defendants, as his sureties, for his guardianship of the relator. The only breach assigned is the nonpayment of the sum of $1092, a balance due from the guardian. Pleas, conditions performed, and satisfaction. The facts were agreed and the jury gave a verdict subject to the opinion of the Court upon the facts, with an agreement that the verdict should ultimately be entered according to the opinion of the Court.

The case is as follows: In August 1842, after the ward came of age, he and the guardian came to a settlement of the account between them, and Cordon was found in arrear in the sum of $2228, for money of the ward that had come to his hands. In satisfaction thereof, he assigned to Jordan notes of third persons to the amount of $1136, and executed his own single bill under seal for $1092, payable one day after date to Jordan; who accepted the same in satisfaction of the balance, and executed a receipt in full to Cordon, but not under seal. At the same time Jordan received from Cordon his negroes and other specific chattels belonging to him. Cordon was then the owner of large estates and was generally thought to be perfectly solvent, though it was known that he was a good deal in debt. He made some payments on his bond, reducing the sum due on it to $892, when Cordon, in 1844, failed and made an assignment of his property and this suit was brought.

The Court was of opinion, that, as Jordan had taken Cordon's bond, in satisfaction of his debt, he could not recover in this suit; and directed the verdict to be entered for the defendants. From a judgment accordingly the relator appealed.

J. H. Bryan and *Shaw*, for the plaintiff.
Badger, *Rodman* and *Stanly*, for the defendant.

RUFFIN, C. J. One is at some loss to conjecture, why this suit should have been brought. The relator has a plain remedy against Cordon on his note; and, if he were to recover against the sureties, there could be little hesitation to relieve them in equity upon such dealings between their principal and his ward. However, that question is not before us now. But upon the question of law, our opinion concurs substantially with that of his Honor.

The pleas are not drawn out; but according to a loose practice in which gentlemen of the bar indulge themselves, there is a memorandum of "conditions performed, and accord and satisfaction." It is therefore understood, that proper pleas of those kinds are to be inserted in the record. It is contended for the relator, that he was entitled to the verdict and judgment, because his receipt, not being under seal, is not an acquittance or release of the bond now sued on; and because one bond is not a satisfaction of another. Those rules are admitted; but they do not, we think, apply here. If this receipt had been an acquittance under seal, it could not have been pleaded as a release of this bond. It does not purport to be such; and, indeed, the ward, not being the obligee in the bond, could not release it. It purports to be an acquittance of the demand of the ward against his late guardian, on the guardian account. Now, suppose it had been founded on actual payment in money, or to be in form a release of the balance of the account, pleas of payment or release of *this bond* would not be sustained thereby, considering this as an action of debt by the State and without connecting the relator with it. Yet no one can suppose, that, after such payment or release, a suit would lie on the guardian bond, in the name of the State, to recover, as damages to the relator for the breach of the condition, the very debt, which he had received or released. So, likewise, in respect to the other objection, that one bond does not merge in another, it is plain that it does not touch this question; for the guardian bond is

not a bond to the ward, and his demand against the guardian does not accrue on it, but upon the receipt by the guardian of the ward's money. If, then, the ward were to sue for this debt in his own name, it would be in assumpsit for money had and received, or upon an account stated, or in equity for an account; and, undoubtedly, in either of those actions, it might be insisted, that the single contract was merged in the higher security of the bond, and in equity, the fair settlement would bar a decree for another account. Those defences are not to be annulled by allowing the ward, instead of suing in his own name, to institute an action of debt on the bond, in the name of the State, and by technical refinements in pleading, exclude them. The actions on these official bonds are given to "any person injured or grieved:" and, as was said in *State* v. *Lightfoot*, 2 Ired. 306, the object is to afford a cumulative remedy, which the party grieved has, independent of the bond. The bond does not create or preserve a cause of action for the relator, but is intended only as an additional security for a demand otherwise arising, which might be recovered by the relator in another action directly in his own name. When he is entitled to no other suit, and has no demand which he could, himself, recover either at law, or in equity, it would be an absurdity to hold, that he was a person grieved, to whom the State gives the right of putting in suit the bond payable to her; or that damages are to be assessed as sustained by him by a breach. Of necessity, then, the Court is obliged to look at the purposes of the action, and the nature of the recovery intended to be made in it. It is not given to every officious person, but only to such as may be injured, "to recover," in the words of the Act of 1762, "all *damages* which *he* may have sustained by reason of the breach of the condition of the bond." The action on the bond is therefore answered by any matter establishing that the relator has no demand against the guardian, and therefore that he has sustained no damages.

It is like a case of a bond with condition for the performance of an agreement or covenant, contained in another instrument. To an action on such a bond it is a good plea, that the defendant performed all the covenants "in the said indenture," contained, *Gainsford* v. *Griffith*, 1 Saund. 51; or that the party discharged him therefrom. 3 *Chitty's Pl.* 789, Doug. 684. Thus, whatever would answer an action on the covenants in the separate indenture, will also answer the action of debt on the obligation; whether it be a performance, or discharge from the performance by release, or the satisfaction of the damages arising from a breach. For this suit is substantially for damages, and comes within the reasons in *Blake's case*, 6 Rep. 43, that the duty does not accrue to the relator in certainty by the bond, but a wrong or default subsequent, together with the statute and the deed, gives him an action in the name of the State as the means of his recovering the damages to him from that default; and consequently a plea of satisfaction of *those damages*, or of a release of them, is good. It may be shewn either that the damages never arose by reason of performance of the covenants, or that the obligor had been discharged from performance, or that amends had been made for a breach of them to the relator. It could not have been the intention of the Legislature to enable one to recover in this form against the guardian and his sureties a demand, for which he could not maintain a suit against the guardian by himself, either at law or in equity. The bond in itself creates no legal duty to the ward; but it is intended only to secure such as have otherwise accrued and continue to subsist independently of the bond.

PER CURIAM. Judgment affirmed.

A good decision. Hic conjugebant jus et justitiæ.

NATHAN WRIGHT vs. THOMAS B. WHEELER.

Where a writ is signed by a clerk in blank, and delivered by himself or his deputy to another person to be filled up and placed in the hands of the sheriff, the clerk is liable to the penalty of one hundred dollars, under the Act of 1836, *Rev. St. Ch.* 31, *Sec.* 46, if no security for the costs has been given, especially after the writ has been returned and regularly docketed by the clerk.

In an action upon a statute to recover a penalty, the plaintiff must set forth, in his declaration, every fact, which is necessary to inform the Court, that his case is within the statute.

Therefore in an action on the statute, *Rev. St. Ch.* 31, *Sec.* 44, 46, against a clerk for not taking "sufficient security" for the costs, the declaration must set forth, either that the clerk took *no security*, or that he took insufficient security, knowing it to be insufficient; otherwise a demurrer will be sustained, or a judgment after verdict be arrested.

Appeal from the Superior Court of Law of Rockingham County, at the Fall Term, 1847, his Honor Judge BAILEY presiding.

The defendant, in the year 1843, was, and still is, Clerk of the Court of Pleas and Quarter Sessions of Rockingham County. In that year a writ issued from his office, at the suit of one Charles G. Taft against the present plaintiff Nathan Wright. The plaintiff's declaration states, that the defendant did issue said writ, and caused it to be placed in the hands of the sheriff, "without having taken of him, the said Charles G. Taft, before issuing said writ, *sufficient* security, conditioned," &c. The action is brought under the Act of 1836, *Rev. St. Ch.* 31, to recover the penalty of $100, given in the 46th sec. By the 44th section, the Clerk of every Court of record, or his assistant in office, is required before issuing any writ or other leading process, to take sufficient security of the person applying for it, conditioned," &c. The 45th sec-

tion directs, that the Clerk by himself or deputy, shall enter all writs issued by him in a book to be kept for that purpose, together with the names of the plaintiff and defendant, and the place of their abode, and the names of the security or securities, and where they live, &c. By the 46th section it is provided: "If any clerk, either by himself or his assistant in office, shall issue any writ, &c. otherwise than as by the two preceding sections directed, he shall pay to the defendant, &c., and shall also forfeit and pay, the sum of $100, &c., for such offence, so committed by such clerk, or his assistant in office, recoverable, &c., one half to the use of the person suing for the same, the other half to the use of the poor of the County." The action is brought to recover this penalty. The case states, that Mr. Read, a practising attorney of the Court, was furnished with a blank writ, by whom he did not know, but, he believed, by the deputy clerk, which was signed by the clerk, and that he filled it up, and put it into the hands of the sheriff to be executed. It further appeared that it was executed and duly returned, and entered on the docket by the defendant, and the defendant afterwards executed a bond for the prosecution of the suit. Under these circumstances, the presiding Judge charged the jury, that the plaintiff was entitled to their verdict, as it was a matter of indifference from whom Mr. Read received the writ, whether from the clerk, his deputy, or some member of the bar.

There was a verdict for the plaintiff and the defendant appealed.

Waddell, for the plaintiff.

J. T. Morehead, for the defendant, argued as follows:

This is an action, brought for the penalty given against the clerk, for issuing a writ without taking security for the prosecution of the suit. The language of the Act is, "If

any clerk, either by himself, *or his assistant* in office, shall issue any writ, &c., he shall forfeit and pay the sum of one hundred dollars, &c., *Rev. St. ch.* 31, *sec.* 46. At the time the paper in dispute was handed out by the clerk with the defendant's signature, it was no writ: it was nothing but a harmless piece of paper: because attestation is essential to every writ. *Constitution of the State, Sec.* 36. The subsequent filling it up and inserting the attestation by a gentleman of the bar, cannot complete the offence, because the act gives the penalty against the clerk, only, for his omission to take security, or that of his *assistant* in office. Members of the bar are not assistants in office, nor does the law recognise them as such. *Shepperd* v. *Lane*, 2 Dev. 148. It is probable that an attorney may issue a writ signed by the clerk, as by the 43rd section of the same Act: "The clerk or *attorney*, issuing process, shall mark thereon the day on which the same shall be issued;" but it is clear that the omission of the attorney cannot subject the clerk to the penalty, because he is not his assistant in office. It is therefore submitted, that there is error in the charge of the Court, and that the defendant is entitled to a new trial.

But should the Court refuse a new trial, a motion in arrest of judgment is submitted, and the following reasons assigned.

1st. The declaration does not allege, that the issuing of the writ was done by the defendant, wilfully or unlawfully, or against the will of Wright, the defendant, or without his leave or consent.

2nd. It is not charged that no bond was taken, at the issuing of the writ, but the averment is, the writ was issued, without having taken *sufficient security;* it should have charged, that no bond or other security was taken. *Chitty's Plead.* 240–41.

3rd. The declaration does not negative the fact, that the writ was issued upon a certificate to sue in *forma pauperis* without security.

4th. It is of the essence of the offence, under the statute, that a writ had issued; which should be set-forth in *hæc verba;* at all events, the declaration should aver all its material parts. The declaration does not set-forth the teste of the writ. An officer who justifies under process must set forth his process in *hæc verba. Chit. Pl.* 228. *Greene* v. *Jones*, 1 Saun. 298, note 1.

Nash, J. In the opinion of the Court below, we entirely concur. The defendant, by signing the writ in blank, and suffering it, in that situation, to leave the office, became responsible for the act of the person, who did issue it, without taking the security as directed by law. He thereby constituted Mr. Read his agent, or in the words of the Act, Mr. Read was his assistant in issuing it. The language of the 46th section is, "If any clerk by himself, or his assistant in office &c." and the 45th directs, "that the clerk by himself or his *deputy* &c." thereby recognising in the act to be done by the clerk, before issuing the writ, a difference between the deputy and the assistant. The deputy is an officer, who must take an oath of office, before he enters upon his duties, and those duties continue as long as his appointment endures. An assistant is one, who is called in by the clerk, without any regular appointment, to aid him, either in conducting the business of the office generally, or to aid him in some particular. A. may be his assistant to-day, and B. to-morrow, and they may both be assistants, either in doing the same matter, or divers matters at the same time. But the defendant's liability in this case is conclusively shown, by the fact that the writ was returned to him, and received by him, and regularly docketed. And he farther became, after its return, the surety on the prosecution bond. By these acts, he recognised and adopted the writ as regularly issued, and is concluded from the defence, that it was done by one not authorised by him. Upon this latter ground, the

opinion of my brother RUFFIN is founded, on this part of the case. If there were no other objection to the plaintiff's recovery, we should without hesitation affirm the judgment. But, unfortunately, the record discloses an error, for which the judgment must be arrested. It is a principle in pleading, that the declaration must set forth a good title to that, which is sought to be recovered; if it does not, the defendant may demur, or move in arrest of judgment, or bring a writ of error. *Archb. Civ. Pl.* 109. In an action upon a statute, to recover a penalty, the plaintiff must set forth in his declaration every fact which is necessary to inform the Court, that his case is within the statute, *Arch. Civ. Pl.* 106; and it is laid down by Mr. *Chitty* in his treatise on pleading, 1st vol. 405, that it is necessary, in all cases, that the offence or act charged to have been committed, or omitted, by the defendant, appears to have been within the provision of the statute, and that *all the circumstances necessary to sustain the action, must be alleged.* In *Bigelow* v. *Johnston*, 13 Joh. R. 429, the same principle is recognised, and the Court state it to be a well settled rule in pleading, that, in declaring for offences against penal statutes, (when no form is expressly given) the plaintiff is bound to set forth, *specially*, the facts on which he relies to constitute the offence. Here no form is presented by the statute. So in Hall's Rep. 1 vol. 324, *McKeon* v. *Lane*, it is decided by the Court, that the declaration must have sufficient certainty on its face, to enable the Court to know what has been done. Facts are to be stated, not inferences, or matters of law, and the party succeeds upon his facts as alleged and proved; nor will the conclusion *contra formam statuti* aid the omission, 1 *Saund.* 135, *N.* 3, 13 *East.* 258. In the case before us, the declaration states the omission of duty on the part of the defendant to consist, in not taking *sufficient security*, before the writ was issued, but it does not inform us of what that insufficiency consists. Did it consist in not taking

any bond, for that would come within the meaning of the statute, or did it consist in taking security which was known to the defendant, when he took it, to be insufficient. The insufficiency meant by the Legislature must have been one of these two, and could not refer to any deficiency in goodness, arising after the bond taken; for it would come neither within the letter nor the meaning of the statute; that evidently refers to the state of the facts at the time when the security ought to have been taken. The declaration, then, is defective: it does not set forth specially the *facts*, upon which the plaintiff relies to constitute the offence; it has not that certainty on its face, as will enable the Court to see what has been omitted. The plaintiff has satisfied himself by stating only the inference, which the law draws from the facts. *McKay* v. *Woodle*, 6 Ired. 353. For any thing that appears on the declaration, the defendant may have taken a bond for the prosecution. If he did, the penalty was not incurred, according to the true construction of the Act, although the surety might not, in fact, have been sufficient, unless the defendant wilfully received him, knowing him to be insufficient. For it was certainly not the intention of the Act to visit the clerk with the penalty, over and above damages to the party, for an innocent mistake as to the sufficiency of the surety. Therefore, the declaration ought to allege, either that the defendant took no bond at all, or that he took a bond from persons that were not sufficient, to the knowledge of the clerk. For it is not enough to bring a case within the words of the statute; but it must be brought within its meaning and legal effect, and as if the words had fully expressed the meaning. As it is the duty of this Court to look into the whole *record* and pronounce such judgment thereon, as the Court below ought to have done, the judgment must be arrested, for the defect in the declaration.

PER CURIAM. Judgment arrested.

THOMAS M. CARTER *vs.* MATTHEW PAGE.

Where A. grants a license to B. to flow the water from B's land through A's ditch, B. has no right to increase the quantity of water so flowed, either by adding to the number of his ditches or clearing new land or enlarging his ditches, so that the flow of water will be greater than it was when the license was granted—and A. may recover damages for any injury sustained thereby.

License to turn one stream upon A's land is not an authority to stop that, at the party's pleasure, and turn another in its stead.

The case of *Carter* v. *Page*, 4 Ired. 424, cited and approved.

Appeal from the Superior Court of Law of Chowan County, at the Fall Term, 1847, his Honor Judge PEARSON presiding.

This is an action on the case for a nuisance, by the defendant's causing water to flow from his land on an adjoining tract belonging to the plaintiff, whereby the plaintiff's land was flooded and injured, and the crops growing thereon destroyed. It was brought March 27th, 1844.

The facts were, that one Haughton, under whom the plaintiff derived title, agreed orally in the year 1839, with the defendant, that he might cut two large ditches through Haughton's land, into which he might open ditches at the upper end, from the defendant's own land, so as to drain the water from the defendant's land into those larger ones, and thence through Haughton's tract. The defendant immediately cut the ditches from the line between himself and Haughton, through the plantation of Haughton, until they came together in the plantation, and thence to a swamp without the plantation. Haughton expressed himself satisfied with the ditches, when done; but it was further agreed that, if they should prove insufficient

to drain both plantations, the defendant should extend the large ditch lower down the swamp.

The defendant then cut small ditches on his own land, so as, by means of some leading into the larger ones through Haughton's land, he drained the land he then had in cultivation, and, according to the evidence, caused a greater quantity of the water to pass off the defendant's land through Haughton's plantation than otherwise would.

In December, 1839, Haughton died; and the plaintiff entered into his tract under a purchase of the fee from his executors.

In 1840, the defendant opened a ditch from his land, through one Rascoe's, in an opposite direction from the plaintiff's land, by means of which a considerable quantity of the water was drained from the defendant's plantation, which otherwise would have passed through the ditches on the plaintiff's land. In the Spring of 1842, the defendant cleaned out several of the ditches on his own land, leading into those through the plaintiff's land, whereby a greater quantity of water was drained from the defendant's land into the plaintiff's, and with more rapidity than otherwise would have been.

In the early part of July, 1842, there was a very heavy rain, and the quantity of water, that flowed down the main ditches from the defendant's land, besides that which ran into them from the plaintiff's own land, was so great as to become ponded at the lower end of the ditch, at the swamp, and to flow over the banks of the ditch and cover several acres of the plaintiff's land; and in August following, a similar occurrence happened. On the 11th of July, 1842, the plaintiff gave the defendant notice, that, after the 1st of January, 1843, he would resort to measures to protect his lands against the water, by which they were flooded by the two ditches, running from the defendant's farm, and that he should hold the

defendant responsible for such damages, as he had sustained or might suffer in consequence of such flooding.

During December 1842, and January and February 1843, the defendant cleared fifty acres more of his land, and dug ditches through the same, so as to turn the streams and water falling thereon, and cause them also to flow from his land into the ditches through the plaintiff's land; and at the same time he cleared out the ditches, that he had before made, as above mentioned, so as to increase considerably the quantity of water flowing from his, on the plaintiff's land.

The counsel for the defendant insisted, that the notice was not sufficient to enable the plaintiff to recover; and, that, at all events, he was not entitled to damages for the loss sustained from the overflowing of his land by the rain and storm of July, 1842, before the notice was given; and, finally, if the jury should believe, that, by means of the ditch through Rascoe's land, as much water was diverted from the plaintiff's land, that would have gone on it from the defendant's old cleared land, as he caused to flow on the plaintiff's land from his new clearing by the ditches through it, that then the plaintiff had no cause of action. But the Court held otherwise on each of those points; and from a verdict for the plaintiff and judgment thereon, the defendant appealed.

A. Moore, for the plaintiff.
Heath, for the defendant.

RUFFIN, C. J. This is the same case, which was here in June, 1844, 4 *Ired.* 424. But upon the second trial, the facts have turned out to be very different from those formerly stated. There the action seemed to have been brought because the defendant merely left things standing as they were, when Haughton's license for the enjoyment of the easement, expired by the death of

that person; for the defendant had done nothing afterwards. We held, the defendant could not be sued for being, thus, merely passive under such circumstances; at all events, without previous notice to abate the nuisance by stopping his drains or diverting the water. We still think that position was right, though we were aware at the time, that it carried the effects of a license once granted, but terminated, to the extreme verge of the law, and upon very nice distinctions. As the case now stands, however, all ground for a notice has sunk; for the defendant, since the license ended, has been active in continuing and increasing the nuisance by scouring his old ditches and opening new ones, whereby there is a much larger flow of water on the plaintiff's land, than there would have been, had the defendant really been passive. The defendant was, therefore, clearly liable for all the damages arising from such increase of water: indeed, for all the damages sustained from the water, since, by acting, when he had no license to increase the quantity of water, he adopted the nuisance as it then stood, and made himself responsible for all consequences. No doubt, a license to drain one's land, by carrying the water on the land of another, includes the power to make ditches for that purpose, and also to cleanse them, while the license is in force. But, when it is determined, there is no more power to scour an old ditch, whereby the flow of water is increased, than to make a new one. They both stand on the same footing; being unauthorised.

It is very clear, that the last point made is also against the defendant. In 1840 he turned in another way a part of the water, that he had once been authorised to drain through the land that now belongs to the plaintiff. That was so much the better for the plaintiff, certainly; and the defendant may be entitled to his thanks for it. Two years afterwards, the defendant cleared other land, not

before drained through the plaintiff's canals, and turned the water from it upon the plaintiff. That is the state of the case; and when sued for this latter act, which was wholly unauthorised, the defendant asks an abatement of the damages or a verdict for him, because he has not done the plaintiff more damage by this injury, than he would have suffered, if the defendant had not done him the favor two years before. Amends cannot be made in that way for trespasses and nuisances, even if it be supposed that the defendant had been at liberty to allow a continuing flow of the water through the plaintiff's land, which he carried through Rascoe's. License to turn one stream upon my land is not an authority to stop that at the party's pleasure, and turn on another in its stead. The two acts are entirely independent, and no deduction can be made from the damages, accruing from one, on account of a benefit derived from the other.

Per Curiam. Judgment affirmed.

THE STATE *vs.* JOHN SHEPHERD.

A deed for land duly proved and registered is evidence, under our Statute, of the transfer of the land, upon every occasion on which it may be offered; as in this case, upon the trial of an indictment for murder.

An indictment for murder, which charges that the homicide was committed on the "*twefth* day of August," instead of the *twelfth* day of August, is good, if not at common law, yet at least under our Statute, *Rev. Stat. Ch.* 35, *Sec.* 12.

An order of removal, directing that "the *trial* of the prosecution shall be removed," &c., is sufficient without directing further that "*a copy of the record* of the said cause be removed," &c.

In an indictment for murder, if the time stated be anterior to the indictment, it is material and only material in one respect, and that is, that the day of the death, as laid, is within a year and a day of that of the wounding.

If that appears from the stating of the month, the *day* of the month is immaterial—according, at least, to the proper construction of our Act of Assembly, *Rev. Stat. Ch.* 35, *Sec.* 12.

The cases of the *State* v. *Moses*, 2 Dev. 452. and *State* v. *Green*, 7 Ire. 39, cited and approved.

Appeal from the Superior Court of Law of Columbus County, at the Fall Term, 1847, his Honor Judge CALDWELL presiding.

The prisoner was convicted upon an indictment for the murder of James Flowers, and moved for a *venire de novo*, and then in arrest of judgment; and after a disallowance of the motions, and sentence of death, he appealed.

On the trial, evidence was given on the part of the State, that the deceased was found, late in the evening, lying by himself on the ground, near the prisoner's house, and badly wounded by stabs in the breast; and he said he was dying and that the prisoner had killed him, and

desired that the prisoner should be called. The witness called the prisoner; and after having at first refused he came to the deceased, and on being asked, why he had served the deceased so, he replied, "that he meant to do it," and then showed a knife, with which, he said, he had inflicted the wounds. On the part of the State, evidence was further given, that the prisoner had antecedently said, that the deceased had bought his land at sheriff's sale, and that the day after he should get a deed for it, he would kill him, unless he gave it up. And then the solicitor for the State offered in evidence a sheriff's deed to the deceased for the land, duly proved and registered, and offered to prove that it had been delivered by the deceased to the register, to be registered the day before the homicide. The counsel for the prisoner objected to the deed being received in evidence, unless its execution was proved on the trial. But the Court received the evidence.

The indictment was found in Robeson Superior Court, at a term beginning on the 1st Monday after the 4th Monday of September, 1846; and runs thus: "The jurors, &c. present, that John Shepherd, late, &c. on the *twelfth* day of August in the year of our Lord one thousand eight hundred and forty-six," &c., made the assault on the deceased, "then and there being," and, "then and there" with a knife gave a mortal wound of &c. of which &c. "the said James Flowers then and there instantly died."

On the affidavit of the prisoner, that he could not obtain justice in Robeson, the Court, on his motion, ordered, "that the trial of this prosecution be removed to the County of Columbus, and that the trial be had on Tuesday of the next term of said Court, and that the sheriff, &c. have the prisoner, &c. on Monday of the said Superior Court of said County of Columbus," &c.

Attorney General, for the State.

No counsel for the defendant.

RUFFIN C. J. A deed for land, duly proved and registered, passes the land by the express words of the Act of 1715; and it is necessarily evidence to that purpose upon every occasion on which it may be offered. For the purposes of this trial, indeed, it would only have been necessary to show, that the deceased professed to have a deed for the prisoner's land, and it would be immaterial whether it was genuine or not. But here it was *prima facie* genuine, and therefore was, at all events, properly received.

The Court has had some doubt of the sufficiency of the indictment, by reason of the false spelling of the day of the month. But, after consideration, we think ourselves obliged to let the sentence stand. We are inclined to the opinion that the indictment is good at common law, because, although the word "twefith," is spelt wrong, by transposing the letter *f*, and placing it before, instead of after *l*, yet it is impossible to mistake the meaning. The false spelling makes no other word, that could mislead. But at all events, the Act of 1811, *Rev. Stat. Ch* 35, *Sec.* 12, cures the defect, if it be one. That makes the indictment sufficient if it "contain the charge expressed in a plain, intelligible, and explicit manner;" and forbids it "to be quashed or judgment arrested for or by reason of any informality or refinement, where there appears to the Court sufficient, in the face of the indictment, to induce them to proceed to judgment." It would certainly be much more satisfactory to the Court, if the Act had specified the omissions or defects, which in the opinion of the Legislature ought not to invalidate the indictment; as has been done in England, by an Act on the same subject, that of 7 and 8 *Geo.* 4 *C.* 64. Among other things, that provides that no judgment shall be stayed or reversed for want of the averment of any matter unnecessary to be proved, nor for omitting to state the time at which the offence was committed in any case, when

time is not of the essence of the offence, nor for stating the time imperfectly. At common law, it was indispensable, that the indictment should fix some certain day at which every material fact constituting a crime occurred. But, although that was the form of the indictment, yet the authorities fully show, it was only material that the time laid should be before the bill found; for, whatever time was laid, it was sufficient to prove on the trial that the offence was committed before the prosecution commenced—unless in those cases in which, the time enters into the offence, and of course, must enter into the description of it—as when an act is made criminal if done in the night, or between such and such days of the year, or the like. In respect to murder, the time is material in one respect, and but in one; which is, that it must appear on the bill, that the day of the death, as laid, is within a year and a day from that of the wounding. For, if it be not so laid, the indictment does not charge murder, as the law attributes the death, not happening within a year and day, to some other cause than the wounding. The present indictment is sufficient in that respect; for, upon the supposition that there is no day of the month laid, it lays the time of the felonious assault and stabbing to be in August 1846, and that Flowers "then and there instantly died" thereof. The whole therefore occurred before the bill found, which was in the latter end of September or first of October following. The question then is, whether the Act of 1811 will support an indictment, which fails to lay a certain *day* as that of committing the crime, but plainly charges it to have been done in a certain month before the bill found. The Court is of opinion, that in order to give effect to the clear purpose of the Legislature, and advance the policy of the Act, it must receive that construction. The indictment is perfectly plain, and intelligible as it is; for we see clearly, that the crime of murder is charged, and

that, as charged, it was perpetrated before the bill was found. We know not what defect can come within the terms "informality or refinement," if the omission of the particular day of the offence committed do not; since, if it had been inserted, its only office would be to show a time before the finding of the indictment, and the proof might be of any other day, provided only, it also be before the finding of the bill. It has been heretofore held, under the Act, that the indictment need not charge any matter which need not be proved on the trial. *State* v. *Moses*, 2 Dev 452. *State* v. *Green*, 7 Ired. 39. Upon the same reasoning it follows, that it is sufficient to lay any matter in the bill, in the manner in which it is necessary to prove it: for that is the substance of the thing. If the bill here had laid, the twelfth of August, 1846, as the day of the offence, proof that it was done in August, either before or after the 12th or without specifying any day, would suffice. Then the indictment is unnecessarily formal, if it go into further particulars, to which no proof need be adduced. To what good end, as the law stands upon the statute, would such an averment in the bill tend? None, unless it be, to render the profession more studious of the precedents, and emulous of perfect pleading. But that is a good result, to the attainment of which, we are not at liberty to sacrifice the intention of the Legislature, that the execution of justice shall not be delayed, nor offenders escape punishment by "exceptions, in themselves, merely formal," and technical niceties.

We probably do not perceive the point of the objection to the order of removal. It has occurred to us, that possibly it was founded on the language of the order being different from that of the statute in this: that the order is, "that *the trial* of the prosecution be removed," whereas the language of the Act is, that the Court shall order "a copy of the record of said cause to be removed to some adjacent County for trial." But in substance, the Act is,

that the place of *trial* is changed; and the other part of the enactment is merely directory as to the document on which the trial is to proceed, namely, on a transcript instead of the original record. Upon the whole order, it appears, that the prisoner and the cause were removed, for trial in the Superior Court of Law of Columbus County; and it is seen in the record from Columbus, (which is that before us,) that a transcript from Robeson Superior Court was afterwards filed in the Court of Columbus, and the prisoner tried and convicted on it. Those things certainly shew a full compliance with the law.

The Court therefore perceives no error in the judgment.

PER CURIAM. Ordered to be certified accordingly

JOHN P. MABRY *vs* JAMES C. TURRENTINE.

Where one has been appointed Coroner of a County, though it may appear he has not renewed his official bonds, as required by law, yet his acts, as coroner *de facto*, are valid, at least as regards third persons.

Nothing can excuse the sheriff for the escape of a debtor, committed to his custody, but the act of God or of the enemies of the Country.

A. recovered a judgment in Surry County Court, against B., and issued on it a *ca. sa.* to Surry County. The sheriff returned "*non est inventus*—the defendant in Hillsborough jail." A. then sued out a *sci. fa.* against the bail of B. and they pleaded that "their principal was then confined as lawful prisoner in the jail of Orange County," and the jury so found. The following entry was then made of record: "It being made appear to the Court, that B. is now confined under legal process in the jail of Orange County and it appearing that the said B. is indebted to A. in the sum, &c. It is therefore, ordered, that notice be issued to the sheriff and jailer of Orange County, commanding them to retain the said B. in prison, until he shall pay and satisfy the said debt and costs to the said A., or until the said B. be otherwise discharged by due course of law." Notice of this order was duly served on the sheriff of Orange. *Held*, that, by virtue thereof, the said B. was duly committed to the custody of the sheriff of Orange, as on a *ca. sa.*, and, that upon the escape of the said B., the sheriff of Orange was responsible to the said A., in the same manner and to the same extent, as if B. had been committed on a *ca. sa.*

Although this order may have been made, nominally, in the suit against the bail, yet that suit was in law but a continuation of the suit against the principal.

The cases of *Burke* v. *Elliott*, 4 Ire. 355, *Gilliam* v. *Reddick*, Ibid 368, *Granbery* v. *Pool*, 3 Ire. 155, and *Lash* v. *Ziglar*, 5 Ire. 702, cited and approved.

Appeal from the Superior Court of Law of Davidson County, at the Spring Term, 1847, his Honor Judge BAILEY presiding.

This is an action of debt for the negligent escape of Mordecai Flemming, committed in execution to the de-

fendant, the sheriff of Orange, by the Superior Court of Davidson on a judgment rendered in that Court in October 1839, for $604 30, with interest &c. and $16 08 for costs. It was tried on *nil debet*, and the facts are stated as follows:

In May 1839, one Adams recovered a judgment against Flemming, in Orange County Court, and at the succeeding November term, the bail of Flemming in that action brought him into the County Court of Orange, and surrendered him, in discharge of themselves; and on the motion of the plaintiff, Adams, a *committitur* in execution was entered in that suit, and the present defendant, then the sheriff of Orange, took Flemming into custody thereon, and committed him to prison.

The writ in the original suit of Mabry against Flemming was served in Surry County, where Flemming resided and gave bail. On the 12th February, 1840, Mabry sued out a *ca. sa.* on his judgment, directed to the sheriff of Surry and returnable to April term, 1840; and it was returned, "*non est inventus*—the defendant is in Hillsborough jail." The plaintiff sued a *sci. fa.* against the bail; and at the next term, April 1841, they pleaded, that the principal, Flemming, was then confined, under lawful process, a prisoner in the jail of Orange county, and so the jury found. The following entry was then made of record:

"It being made to appear to the Court, that Mordecai Flemming is now confined under legal process in the jail of Orange county, and it appearing also, that the said Flemming is indebted to the plaintiff, John P. Mabry, in the sum of $604 30, with interest thereon from October term, 1839, and also in the sum of $16 08 for costs: It is therefore ordered that notice be issued to the sheriff and jailor of Orange county, commanding them to retain the said Flemming in prison, until he shall pay and satisfy the said debt and costs to the said plaintiff,

or until the said Flemming be otherwise discharged by due course of law."

A copy of the order was issued by the clerk and served on the defendant on the 23d of November, 1841, by Pride Jones, as returned by him under his hand as coroner. The counsel for the defendant objected to receiving the return in evidence, because, as he alleged, the said Jones was not coroner in November 1841; and in support of the objection, he gave in evidence a copy of the record of the appointment of Jones as coroner at February term, 1840, and of his then taking the oaths of office and giving bond; and, it not appearing of record, that any bond had been subsequently accepted by the Court, the counsel for the defendant insisted, that the said Jones was not legally in office at the time his return purported to be made, and, therefore, that the return was not evidence. On the part of the plaintiff, a bond was then introduced and its execution proved, bearing date in May term, of 1841, of the County Court, which purported to be the official bond of Jones, as coroner, and his sureties; and the clerk of the County Court proved, that when he came into office after 1841, he found it among the records and papers in his office. The Court overruled the objection, and received the return in evidence.

The plaintiff then gave further evidence, that the defendant was the sheriff of Orange from the 20th day of November, 1839, to the 1st day of November, 1844, inclusive, and that on the latter day, Flemming escaped from jail, after having been detained a prisoner there by the defendant from November 1839.

On the part of the defendant, evidence was then given, that the jail of Orange was new and strong, and that Flemming had effected his escape therefrom at the time mentioned, by sawing asunder two iron bars of the grate in a window, and thereby making an opening large enough to get through; and also that the doors of the jail were

locked on the evening before the escape. And he gave further evidence, tending to show, that Flemming was assisted to escape by some one outside the jail.

Upon the foregoing evidence, the counsel for the defendant insisted, that he was not liable in this action unless upon proof of a wilful participation in the escape of Flemming, or of gross and culpable negligence of the defendant; and also, that the order of the Superior Court of Davidson was not a sufficient commitment in execution, to render the defendant liable in this action; and he prayed the Court so to instruct the jury. But the Court refused to give such instructions, and instructed the jury that Flemming was duly committed in execution on the plaintiff's judgment, and that the defendant, after being served with a copy of the *committitur*, was bound to keep him a prisoner in execution therefor, and was liable for his escape, although the jail was new, and as good as any in the State, and although Flemming might have been aided in escaping by persons outside—unless such escape was effected by the act of God or the public enemies. The plaintiff had a verdict, and judgment, and the defendant appealed.

J. H. Bryan and *Morehead*, for the plaintiff.
Waddell and *Norwood*, for the defendant.

Ruffin, C. J. The coroner's return was properly admitted. The *Rev. Stat. Ch.* 31, *Sec.* 126–7, requires sheriffs and coroners to serve all notices in any cause or proceeding, and enacts that their returns on the notices shall be evidence of the service. But the objection is, that Jones was not coroner, because he did not renew his bond, or the Court did not accept a new bond from him, and that, therefore, he was not capable of holding the office, according to the statute. *Rev. St. Ch.* 25, *Sec.* 3. It is no part of the objection that Jones, who had been duly appointed and admitted into office originally, was not

acting as coroner, and so recognised generally by the public authorities and the community.

Therefore, those facts are to be assumed; and, so assuming, it is clear, that the want of an official bond does not impair the validity of his acts, as *de facto* the coroner, in reference, at least, to third persons. *Burke* v. *Elliott*, 4 Ired. 355. *Gilliam* v. *Reddick*, 4 Ired 368.

In the case of *Adams* v. *Turrentine*, the Court has already decided at this term, that nothing can excuse the sheriff for the escape of a debtor, but the act of God, or of the enemies of the Country.

The remaining point is, whether Flemming was duly committed to the custody of the defendant, in execution on the plaintiff's judgment. Objection is made, both to the authority of the Court to commit in this case, and also to the form of the commitment. The authority of the Court is questioned upon the strength of the provisions of the Act of 1777, *Ch.* 115, *Sec.* 22—which provides, that, if a sheriff shall return upon a *scire facias* against bail, that the principal is imprisoned by virtue of any process civil or criminal, the Court, to which such *scire facias*, is returnable, shall, on motion of the plaintiff or bail, order that "such principal be retained where he shall be a prisoner until the plaintiff's judgment and costs shall be paid, or be otherwise discharged by due course of law; and that a copy of the order served on the keeper of such prison, before such prisoner's releasement, shall be sufficient authority for him to retain such prisoner, until such order be complied with." The Act further provides, that this shall be deemed a surrender of the principal, and a discharge of the bail. It is said, that this gives a special authority to commit under the particular circumstances of a *scire facias* against bail, and the return thereon of the sheriff, of the imprisonment of the principal by him; and that, as the sheriff did not so return on this *sci. fa.* and indeed could not, inasmuch as the imprisonment was in another County, the Superior Court of Davidson could

not, in the debtor's and sheriff's absence, commit in execution. But we think the nature of this enactment is entirely mistaken, and that the object was not to confer a jurisdiction or authority on the Court in a particular case, but to give a privilege, in that case, to the bail, rendered necessary by the situation of our Country, and by our judiciary system, and to make it imperative upon the Court to act on certain evidence to that end. It is an ancient common law jurisdiction to commit in execution, by order of record, such persons as are surrendered by their bail, or upon a judgment recovered against one already in prison. The regulations of the modes of proceeding are not prescribed positively by statutes, but exist as rules of practice adopted by the Courts, from time to time, for the convenience of the suitors, bail, and officers, to prevent surprise on the one hand, and oppression on the debtor, on the other hand. The subject is well treated, and the nature of the jurisdiction well explained in *Tidd's Pr.* 286, 364; and 2 *Sellon's Pr.* 100 to 111, both as to the modes of committing, and to the *supersedeas.* Now surrenders may even be made before a Judge at his chamber and he may order the *committitur;* and for any irregularity the debtor has his *supersedeas.* It is unnecessary to comment particularly upon those passages, as they have no obligation here, and are only referred to, as shewing the nature of the jurisdiction and the practice under it. The *committitur* is, in substance, a *capias ad satisfaciendum,* and therefore within the power of the Court at common law to award, and is often indispensable, where the party cannot resort immediately to his *ca. sa.;* for example, when the principal is surrendered during the term in which the judgment is taken. As the *ca. sa.;* does not go until the term ended, the commitment in execution is absolutely necessary to the security of the creditor. Now, in England, the course is to bring up a prisoner from another jail by *habeas corpus,* in order to his surrender and to charge him in execution;

and it is generally highly proper in order to identify him to the Court and to the officer, and to justify the latter as to the person, if sued for detaining the wrong person, as well as for other reasons. But there is nothing in the nature of the thing to prevent the Court from making an order of commitment of a person, not present in Court; and, in many cases in this State, the power to make such an order is absolutely necessary to the convenience of parties and the advancement of justice. By the Act of 1777, bail have the right to surrender the principal; but it can be done only to the sheriff, who made the arrest, or in open Court. But, if the principal be in prison in another County, he cannot be surrendered to the sheriff who arrested him; and, in many cases, it would be impossible, and, in most, highly inconvenient, to bring him to the Court in person.

For our Counties are so numerous and so distant from each other, and the terms of our Courts so short, that after process served on the bail and returned, the *habeas corpus* could not issue, and the party be brought in time to relieve the bail. True, the *habeas corpus* might be made returnable to a subsequent term; but that would be highly mischievous, as the sheriff cannot take bail after judgment, and would be compelled to retain the prisoner the whole time under all circumstances. Besides, the provision of the Act extends to all cases, whether in the County, or the Superior Court. Therefore, in cases, in which a debtor is lawfully imprisoned in one County, and his bail is proceeded against in the Court of another County, it was a justice done to the bail, that he should be relieved upon shewing those facts, without being required to make an actual surrender in Court. It was the purpose of the Legislature to require such relief for the bail from the Courts, and also to make the return of the sheriff on the *scire facias* against the bail sufficient evidence.

But, certainly, it was not intended to make that the only evidence, nor to say that, in the case of such a return only, should the Court order the *committitur*, or order it in the absence of the party. Why should it have been so enacted? It is possible, indeed, that the person in prison may be mistaken, and may not be the debtor. But, suppose the fact, the prejudice can be no greater to him than would result from his arrest as the debtor under a *ca. sa.*; and his remedies would be as ready and as complete. In either case he would get a *supersedeas* or *habeas corpus*; in the latter he would have his action also against the sheriff, and in the former, against the creditor or bail. But, at all events, the Legislature has positively enacted that, as is admitted, it may, and, as we think, shall be done in one case; and therefore, there can be no reason why the Courts may not mould their practice, on this subject, so as to make it, in other cases, conform in principle to the legislative enactment, and promote the convenient administration of justice. In *Granbery* v. *Pool*, 3 Ired. 155, it was taken for granted, that, by the sound construction of the Act of 1777, orders for commitment in execution might be made in all cases, where the principal was imprisoned within the State, and a copy of the order served on the sheriff, would justify his detention. It is impossible, the Act is to be restricted to the narrow limits contended for in this case. For, suppose the sheriff refuse to return the imprisonment, although the fact be so, is the bail to lose the benefit of the fact, and be forced to trial at the first term and fixed with the debt? Surely not. The substance of the provision is, that if the principal be imprisoned, so that the bail cannot surrender him personally in Court, when the bail is called to answer for the debt, he may make the fact appear, and he shall be discharged as upon a surrender. Indeed, the Act says, such imprisonment shall be *deemed* a surrender, and therefore it may be pleaded, and relied on as having that effect. If the

bail be discharged thereby, it is a necessary consequence, that the creditor has a right to demand a *committitur*, as a security for his debt. It may well be, that the Court is not bound, and therefore, would not accept a surrender of this kind from the bail, before a step taken to charge the bail by *scire facias*, inasmuch as it may be in the power of the bail to surrender the principal, when the creditor shall call for him. But in the case before us, the bail was clearly entitled to be exonerated, since the creditor was seeking to fix the bail, and would have done so, unless the principal's imprisonment authorised an exoneration; and the exoneration of the bail gives the creditor the right in justice, and according to the Act of '77, to require the debtor's detention in execution.

It is the opinion of the Court, therefore, that the *committitur* was rightly made upon the facts found, when it was ordered.

But, whether it was so or not, and admitting it to have been erroneous for the reason that it was not founded on a proper return of the sheriff, yet that would not excuse the escape. For the subject was within the jurisdiction of the Court and the sheriff could not tell that the Court had not acted on a case within the words of the act, and ought not to be prejudiced by any error of the Court in that respect; and, therefore, the *committitur*, when served on the sheriff, was "a sufficient authority for him to retain the prisoner." If the sheriff be justified in detaining the prisoner, it is perfectly settled that he is bound to do so, when there is a judgment. As he is not chargeable for the error in the judgment or process, such errors cannot excuse him, unless they be such as render the whole absolutely void, as for want of jurisdiction and the like. It is not for the sheriff to allege, that the Superior Court made the order upon insufficient evidence. Moreover, it appears in this case, that, in point of fact, Flemming, the plaintiff's debtor, was lawfully imprisoned

under the custody of the defendant, in the jail of Orange at the time, that in the Court of Davidson he was so found to be, and ordered to be retained by the defendant. No injustice then was done to any person by the *committitur*, and the defendant was duly served with a copy of it.

It was further said, that the order was made in the suit against the bail, and not in that between Mabry and Flemming; and for that reason, that it was not a commitment on the judgment in the latter case. We do not know that we can understand, that the order was made on the record of either suit, after it was made up and engrossed. We presume it was put on the minutes in the usual way during the term, and that it is to be considered a part of the record, to which it properly belongs ultimately. But, we do not deem that at all material, as the suit against the bail is founded on the first judgment—being a *scire facias* on that record, to which *nul tiel record* is pleadable; and the whole is so much one suit, that after judgment against the bail, execution may issue against the principal and the bail jointly, *Rev. Stat. c.* 10, *s.* 3. The order was therefore made in the suit against Flemming. It specifies the debt and costs, and substantially conforms to the precedents, as modified by the Act, directing the Court to "order the defendant to be retained where he is prisoner, until the plaintiff's judgment and costs shall be paid, or be otherwise discharged by due course of law." It is in effect a *ca. sa.* and ought to render the defendant chargeable in like manner for an escape, as is settled in England, and has been held by this Court. *Lash* v. *Ziglar*, 5 Ired. 702.

Per Curiam. Judgment arrested.

GENERAL RULES

ADOPTED AT JUNE TERM, 1847.

In consequence of the changes made necessary by the Act of the General Assembly, passed at the late Session, whereby a Term of the Supreme Court is required to be held at Morganton, and the period of holding one of the Terms at Raleigh is altered, the Judges of the Supreme Court find it proper to make and publish the following Rules:

I. All applicants for admission to the Bar must present themselves for examination within the first two days of the respective Terms.

II. All Causes, which shall be docketed before the eighth day of a term, shall stand for trial during that term. All appeals, which shall be docketed afterwards, shall be tried or continued at the option of the Appellee. All Suits in Equity, transferred to this Court for hearing, and not docketed before the eighth day of a term, shall be continued at the option of either party.

III. During the two first days of the term, the Court will hear motions, and try causes by consent of the Counsel on both sides. On the third day of the term, the Court will proceed regularly with the dockets; first, with that of the State; secondly, the Equity; and thirdly, the Law causes.

IV. For the Court held at Raleigh, the Clerk will docket the causes in the following order, namely:—Those from the fifth Circuit shall be placed first, then those from the fourth Circuit, and so on to the first Circuit.

V. For the Court held at Morganton, the Clerk will docket the causes in the following order, namely:—Those from the Seventh Circuit shall be placed first, and then those from the Sixth Circuit, and then those from other Counties.

VI. When causes are called, they must be tried or continued, unless for special cause the Court should extend the time for the argument, and except that Equity causes under a reference may be kept open a reasonable time for the coming in of the reports and filing and arguing exceptions.

E. B. FREEMAN, *Clerk.*

MEMORANDUM.

The Honorable JOSEPH JOHN DANIEL, one of the Judges of this Court, died at Raleigh on the tenth day of February, 1848, aged about sixty-five years.

He was a native of Halifax County in this State. He was graduated at the University of North Carolina, and studied law under the late General DAVIE. Soon after coming to the bar, his talents and attainments gained him a high eminence, and in 1816 he was appointed a Judge of the Superior Courts of Law and Equity, the Judges of which Courts at that time exercised the functions of a Supreme Court. In 1832 he was appointed a Judge of the Supreme Court, under its new organization.

The following proceedings of the Bench and Bar of the Supreme Court, upon the occasion of his death, are extracted from the minutes of the Court, where they were ordered to be recorded.

SUPREME COURT.

FEBRUARY 12, 1848.

Court met pursuant to adjournment—

Present: the Honorable THOMAS RUFFIN, C. J.,
Honorable FREDERICK NASH, J.

On the opening of the Court, the Hon. JAMES IREDELL presented the following Proceedings of the Bar, and requested their Honors to order them to be entered on the minutes:

At a meeting of the Bar of the Supreme Court, held in the Court Room on Friday, 11th February, 1848, in consequence of the death of Judge JOSEPH J. DANIEL,

On motion, Hon. John H. Bryan was appointed Chairman, and Perrin Busbee Secretary.

Hon. James Iredell moved that a Committee of six be appointed to report Resolutions expressive of the feelings of the meeting.

The Chairman thereupon appointed the following gentlemen, viz: James Iredell, Charles Manly, H. W. Husted, George W. Mordecai, George W. Haywood, and Henry W. Miller.

Mr. Iredell subsequently reported in behalf of the Committee, the following Preamble and Resolutions, which were unanimously adopted:

The Members of the Bar of the Supreme Court, now in attendance, have learned with deep grief, the great loss which this Court and the Country have sustained in the death of the Honorable JOSEPH J. DANIEL.

A Judge so learned in the Law, so patient in his investigations, so pure in his purposes, so gentle in temper, and so generous in his acts, could not be called from his labors, without causing the most sincere sorrow in the hearts of those who have so long honored and loved him.

Such sorrow we now feel, and but feebly express in the following Resolutions:

1. That in the death of the late Judge DANIEL, the Supreme Court of North Carolina has lost a learned and able Jurist, and the State an eminently good and useful citizen.

2. That in token of our respect for his memory, we will wear the usual badge of mourning for thirty days.

3. That these proceedings be presented to the Court, at their first meeting, with a request that they be entered on the minutes.

4. That the Chief-Justice be requested to communicate a copy of the foregoing Resolutions to the family of the

deceased, with the assurance of our sympathy with them under their sad bereavement.

JOHN H. BRYAN, *Chairman.*

PERRIN BUSBEE, *Secretary.*

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To which Chief-Justice RUFFIN, on behalf of the Court, replied as follows:

The surviving Members of the Court, receive with deep sensibility, the proceedings of the Bar in commemoration of our late and lamented Brother. They but express our own emotions upon that melancholy event, and are no more than a just tribute to the unsullied purity of his personal character, his learning, and long and useful official labors.

He served his country, as a Judge, through the period of, very nearly, thirty-two years; and he served acceptably, ably, and faithfully.

He had a love of learning, an enquiring mind, and a memory uncommonly tenacious; and he acquired and retained a stock of varied and extensive knowledge, and, especially, became well versed in the History and Principles of the Law. He was without arrogance or ostentation, even of his learning: had the most unaffected and charming simplicity and mildness of manners, and no other purpose in office, than to "execute justice and maintain truth;" and, therefore, he was patient in hearing argument, laborious and calm in investigation, candid and instructive in consultation, and impartial and firm in decision.

With these properties and his long experience, it is no wonder, that he should have proved so eminent on the Bench, as to endear himself to his Associates, gain the high respect and regards of the Profession, and the confidence of the Country. He did so to such a degree, that few men, if any, were in life more honored among us, or in death, we think, will be more deplored.

Fully sharing in these sentiments and feelings, the Court readily joins in the expression of them, and yields to the wish of the Bar, that these proceedings should be entered on the minutes, and also communicated to the bereaved children of our late venerated Friend and Brother.

Mr. Mordecai, on behalf of the Bar, requested that the response of the Chief-Justice to their proceedings, might also be spread upon the minutes of the Court:—and it is ordered accordingly.

EDMUND B. FREEMAN, *Clerk.*